United States Court of Appeals
for the Second Circuit

JOINT APPENDIX

77-7102,7114

United States Court of Appeals
FOR THE SECOND CIRCUIT

◆

Docket Nos. 77-7102 and 77-7114

NEW YORK ASSOCIATION OF HOMES FOR AGING, et al.,
Plaintiffs-Appellants,
against
PHILIP L. TOIA, as Commissioner of Social Services
of the State of New York, et al.,
Defendants-Appellees.

UNITED STATES COURT OF APPEALS
FILED
MAR 30 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

◆

JOSEPH BULLA, et al.,
Plaintiffs-Appellants,
against
PHILIP L. TOIA, as Commissioner of Social Services
of the State of New York, et al.,
Defendants-Appellees.

B 8/5

JOINT APPENDIX
VOLUME IV: Pages 1816 to 2234

Proskauer Rose Goetz
& Mendelsohn
Attorneys for Plaintiffs-Appellants
in Docket No. 77-7102
300 Park Avenue
New York, New York 10022
(212) 593-9000

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Defendants-Appellees
in Docket Nos. 77-7102
and 77-7114
2 World Trade Center
New York, New York 10047
(212) 488-3391

Andrew P. Zweben
Legal Services for
the Elderly Poor
2095 Broadway
New York, New York 10023
(212) 595-1340

Stephen M. Jacoby
American Jewish Congress
15 East 84th Street
New York, New York 10028
(212) 879-4500

Attorneys for Plaintiffs-
Appellants in Docket
No. 77-7114

PAGINATION AS IN ORIGINAL COPY

1816

jbesb

FILE: HANYS
Nursing Homes

38050
012

UNITED S'
SOUTHERN

- - - -

NEW YORK ASSOCIATION OF HOMES FOR AGING, INC., et al, :
Plaintiffs, :
vs. : 76 Civ. 5113
PHILIP TOIA, et al, :
Defendants. :

- x

NATHAN KLUGER, et al, :
Plaintiffs, :
vs. : 76 Civ. 5233
PHILIP TOIA, et al, :
Defendants. :

- x

N. Y. STATE HEALTH FACILITIES ASSN., :
Plaintiffs, :
vs. : 76 Civ. 5320
PHILIP TOIA, et al, :

- x

February 4, 1977

BEFORE:

HON. THOMAS P. GRIESA,

District Judge

APPEARANCES:

FOR THE PLAINTIFFS:

MR. MISHKIN

MR. STERN

MR. NEWMAN

MR. HALLISEY

FOR THE DEFENDANTS:

MR. MANTZOROS

MR. MAC HARG

MR. ROLLO

and others.

- - - - -

(Case called)

THE COURT: I would like to announce, first of all, that I have been receiving a great mass of communications consisting largely of correspondence of one kind or another and that must stop.

It is a totally disorderly way to proceed and I don't know what the parties think this is but it is a court and we just don't have sort of a continuous interchange of correspondence. I can't answer this correspondence and I get copies of all kinds of letters and letters to me, apprising me of things.

It is not evidence, it is not legal argument. I don't know what it is intended to be and I am herewith directing that all correspondence cease to this Court and I am further stating that the correspondence that has been received has not been read; it is not an appropriate submission.

Now, if there is an application, it can be made on papers that are proper. If there is evidence to be taken in addition to the papers, it can be taken by testimony in court. If there are exhibits to be introduced, they can be introduced and received, but that is the way we will proceed.

Now, is there an application before me now?

MR. MISHKIN: Your Honor, we submitted an affidavit on Monday --

THE COURT: Right. What is the application?

MR. MISHKIN: The application is --

THE COURT: It is not just a matter of continuously submitting affidavits when anybody takes a notion that they want to submit things.

MR. MISHKIN: Your Honor, we are here to urge that the preliminary injunction that we moved for in November be granted.

At our last session --

THE COURT: Do we have the transcript of the last session?

Our last session was December 22nd.

MR. MISHKIN: That's right, and two things occurred at that time.

First, the defendants announced that there would be some new rates going into effect for January 1977, and, secondly, defendants assured the Court that there would be some expedited process for reviewing the financial situations of those homes that had been most severely affected by rate reductions in an effort to provide some relief to those homes.

THE COURT: Well, let's get clear on one thing --

that as of that date, the plaintiffs' attorneys announced to me that they were not, at that time, pressing for the granting of any injunctive relief relating to rates subsequent to the period January 1977. Okay.

The obvious reason for that was that there had been an announcement of new rates to take effect January 1, 1977, so the position of the plaintiffs' attorneys at that time was tantamount to a withdrawal of the application for a preliminary injunction as to rates in effect beginning January 1, 1977.

The particular phraseology may have been that you were not pressing for such injunction and I am not saying that there was any withdrawal with prejudice or anything like that, but that was the posture and it was abundantly clear that there was no request for relief as of that moment with respect to the period beginning January 1, 1977.

Our discussion on that day, and it was hours of discussion, related to the question of what to do about the period November and December 1976, and whether there could be any relief granted as to those two months and that led to a very lengthy discussion,both on and off the record, lasting hours and hours.

At the conclusion of that discussion, I

announced whatever it was I announced, beginning at page 124 of the transcript of December 22nd, and I stated that as far as limiting -- as far as an application limited to November and December, I felt that it was a radically different application than was presented before because it was in part retrospective, or it could be argued it was retrospective, and I stated that I was not intending to rule on such an issue because there was not an adequate presentation.

So that is how it was left.

Now, if you are intending to make an application now, it seems to me that it is not just a matter of activating something which was fully briefed and presented before because, it would seem to me, you would have to apply for the specific relief in light of these circumstances and particularly in light of the definition of your position which you gave on December 22nd.

MR.MISHKIN: Your Honor, if I may clarify it, because I think there may be need to, there was never any intention on the part of the plaintiffs to withdraw the motion for a preliminary injunction, which was made in November.

As we understood it, on December 22nd, because the January 1 rates which had been announced that day had not been analyzed, there was, as your Honor said, a new set of circumstances which had to be analyzed and that is one of the reasons we are here today, because we have now analyzed those rates.

The schedules that reflect what those new rates will do have been attached to the affidavit of Mitchell Wade, which we submitted on Monday, and the point is that even after those rates go into effect, and no one has yet been paid under the new rates, but assuming those new rates go into effect, there will still be in excess of one-hundred nonprofitable facilities whose reimbursement rates will still be lower, substantially lower than they were pre-November 1, 1976.

So as to more than one hundred of the members of the class, there is no change at all in the application that we made in November and we certainly do not regard this as a new application with respect to that group.

THE COURT: I am not worried about the formalities. I am just worried about this:

I believe that any application made now has to be treated as such. Obviously, the action was begun in November and papers were submitted and evidence was taken and that is in the record, and I am familiar with it.

I am not saying your action wasn't commenced then and I am not saying you did not make a motion then, but I want us all to be careful that we simply recognize that as of December 22, you announced that you were not then pressing the application for preliminary injunctive relief for the period to be covered by the new rates, so, whether you want to call it a new application or a renewal of an old application or whatever, I will consider it a new application.

I have heard -- this is the first hearing since December 22 and that was a period of over one month.

MR. MISHKIN: Five weeks.

THE COURT: And it seems to me inevitable that the main focus of any hearing we have now must be on the current conditions, which is what you are trying to address.

MR. MISHKIN: Yes, but, your Honor, I --

THE COURT: I don't want to get into a semantic or formal problem but let's just organize ourselves.

You have submitted an affidavit and does the affidavit specify what relief is sought? Is it the same relief that has always been sought?

MR. MISHKIN: Yes, it is, your Honor, it is a request for an injunction enjoining the implementation of any rates that are lower than the pre-November 1, 1976 rates.

That has not changed.

THE COURT: As to the ones that have not been raised, you don't want any injunction as to that.

MR. MISHKIN: There are approximately twenty-five or thirty homes that because of the January 1 rates went up to or slightly above what they had been receiving pre-November 1, 1976. As to those homes, there may be a different situation, but for the hundred homes, and there are more than a hundred homes in the class that are still going to receive, even under the new January rates, reduction, prior to that date, our application has not changed at all.

THE COURT: So you are saying that as of now, you want a preliminary injunction retroactive to November 1 enjoining the application of any rate changes, whether they took effect November 1 or subsequently, which reduced the rates below the November 1 rates, is that right?

MR. MISHKIN: That's correct.

THE COURT: Okay. Now, you feel that the second supplemental affidavit of Mitchell Wade is all that you wish to submit?

MR. MISHKIN: All the additional material that we need.

THE COURT: All the additional?

MR. MISHKIN: Yes.

THE COURT: You do not intend to submit any additional briefs on the law, is that correct?

MR. MISHKIN: That's correct, your Honor.

Now, the events --

THE COURT: Do the defendants wish to submit anything?

MR. MANTZOROS: That was the reason we made the request for the adjournment, for the matter of record, anyway.

THE COURT: This is really an organizational meeting.

MR. MANTZOROS: I understand perfectly, your Honor, and I don't mind coming down today and I understand perfectly because I was going to ask the Court for leave to respond to the papers that were just filed and which we received Monday afternoon and which Mr. MacHarg and the other counsel up in Albany received yesterday afternoon. We have not had a chance to study them and make a response.

THE COURT: I have gotten a whole raft of papers from your side, too.

MR. MANTZOROS: I understand that. As a matter of fact, I did not understand that was going on. I don't think I even have anything that your Honor has.

I have received some covering letters recently from January 6. I just received the January 6 letter on Monday for the first time. I did not know that this was going on because I would have stopped it.

THE COURT: Well, I think that I am going to do this, Mr. Mantzoros:

I am going to now give you the things that I have received from the Department of Health and I think that what you should do is to figure out whether you believe they should be made a part of the record and, if so, they should be introduced with an affidavit or with testimony.

Now, I don't know that I have all of this in the chronological order --

MR. MANTZOROS: No. I won't take up your time. I can --

THE COURT: No. I will put it on the record. I have a letter, January 6, 1977, from Frank T. Cicero to me with numerous attachments.

I have a letter dated January 28, 1977, from Frank T. Cicero to me with numberous attachments.

Then I have a copy of a letter dated January 21, 1977, from Glen Haughie, Deputy Commissioner of the Department of Health, to Thomas H. Morris, and I will give that to you.

I have a copy of a letter dated January 17, 1977, from Frank T. Cicero, to Steven Silverstein, and I will give that to you.

I have a letter dated January 17, 1977, from Donald P. Davidoff to Morris Wachs, a copy to me, and I will return that to you.

Now, I think maybe we should do the same thing with the materials, all these other materials, and the parties should decide whether they should be made part of the record because if they are just correspondence, it is just not workable.

I have a letter dated January 28, 1977, from Geneva Hospital Nursing Home, Co., to the Department of Health, and it has some enclosures and I will give that, I assume, to the plaintiffs' side.

There is a letter from the Association of Homes, January 7, 1977, to Dr. Cicero.

A letter between the same parties, January 3, 1977.

A letter between the same parties, January 25, 1977; two letters of January 25.

There is a letter from the Mary Manning Walsh Home to Dr. Cicero, January 21, 1977, with attachments.

There is a mailgram from the Carmel Richmond Nursing Home to Dr. Cicero, I believe dated January 25, 1977.

Now, if those should be part of the record, you make them part of the record in the right way.

MR. MISHKIN: Your Honor, might I have three or four minutes to review what has gone on in the past few weeks.

THE COURT: Of course you may.

MR. MISHKIN: As I noted earlier, one of the things that happened on December 22 was that the defendants gave certain assurances that there would be some expedited process.

Now, one of the initial things that happened in connection with that process was that a letter was sent to you by Dr. Cicero dated January 6, 1977, and I think it is one of the ones that you referred to, and in that letter, Dr. Cicero said that the review process was being scheduled for an initial group of thirteen homes and he also said that specific relief had already been provided to three homes.

This was back on January 6, and he said Loretto, one of the named plaintiffs, Mary Manning Walsh and the Hebrew Home at Riverdale had received increases.

One of the letters that I think your Honor referred to was a letter from the office of the Budget Director, which now states that the increases announced to you on January 6 have not been approved.

So that the promise made in that letter has not been kept but that is really a side matter because even if it had been kept as to those three homes, we would still be here today urging a grant of the preliminary injunction.

But now the review process for the original group of thirteen homes has taken place and that process has amounted to the homes being called to Albany to have a meeting with representatives of the Department of Health and at each of those meetings being told that in order to live within the new reduced rates, they must make substantial cuts in their operating patterns and when I talk about the new rates, getting down to the new rates, I am talking about the January 1, 1977 rates, because those were in contemplation when these cuts were suggested.

Just very briefly, as examples only of the kinds of cuts that were suggested, the Beth Abraham Hospital was told to cut $2-1/2 million immediately out of its budget of about $13 million.

The Sephardic Home with a budget of about $5 million was told immediately to cut $1 million.

Mary Manning Walsh with a budget of about $7 million was told immediately to make cuts in excess of $1 million.

Now, I want to stress, your Honor, that prior to these meetings, none of these homes has ever been told that any of their costs were excessive, that they were spending too much, that they were not prudent buyers or they should eliminate any of their staff. This was the first time they heard it.

In short, this review process that was promised a month ago has resulted in no relief being granted to any facility and that brings us to a very serious point because there are homes around the state, not only can't they pay their vendors, make their mortgage payments, they can't meet their payrolls and in some cases, they are simply going to close.

One of the exhibits to the most recent Waife affidavit is another affidavit from the administrator of the Plaza Nursing Home in Syracuse, New York, stating that the Board of Directors of that nonprofit institution have already determined they cannot operate on the new rates and will go out of business.

THE COURT: What about Plaza, Mr. Mantzoros?

MR. MANTZOROS: Excuse me. What about what?

THE COURT: He says Plaza is going out of business in Syracuse.

MR. MAC HARG: Plaza is due for review this coming week on our schedule. They haven't had their review yet.

THE COURT: Are you talking about Plaza as one of them that has been reviewed?

MR. MISHKIN: No, but using the thirteen that already have been reviewed, the review process has amounted to nothing more than a direction by the state to make the cuts and as we have seen in the episode with Dr. Cicero's letter, whatever the department feels has to go through the budget people, and I don't know how far off that is, but we have immediate problems, and Mr. Hallisey, who is counsel to Mary Manning Walsh, can tell you their problems. They are unable to meet their payroll.

THE COURT: Has the Walsh Home been reviewed?

MR. MISHKIN: They were told to cut $1 million.

THE COURT: Cut a million out of seven?

MR. MISHKIN: And I would also note --

THE COURT: Did that have an increase?

MR. MISHKIN: It had an increase of -- in January of 1977?

THE COURT: Right.

MR. MISHKIN: It went up a dollar or two but it is still far under what it was getting before.

THE COURT: Has the dollar increase been put into effect?

MR. MAC HARG: Your Honor, Mary Manning Walsh has been submitted the budget. The Budget has rejected the submission that the department made believing that a complete survey of the facility is necessary to disclose why the costs are so high. We have only to react to the Budget's review of this.

THE COURT: Now, look. I think if I went over the transcript of our previous hearings, I would find some rather strong assurances that if the Department of Health recommended decreases, there would be no problem about putting those into effect because this was a point which the plaintiffs' lawyers made strongly.

They said that -- well, they said there was no assurance. And you remember there was a gentleman from the Budget Director here and it was late one evening and we were down in Room 507 and we spent a lot of time --

MR. MAC HARG: I don't think I was present.

THE COURT: Right. You were present.

MR. MAC HARG: No. I was at the other hearing.

THE COURT: Have you read the transcript?

MR. MAC HARG: December 22?

THE COURT: You were here, Mr. Mantzoros, weren't you?

MR. MANTZOROS: Yes. As far as assurances, I don't know about a promise because the Budget has a job to do and they have not turned it down, but all they said was to go into it and make a further survey.

THE COURT: How long is all that going to take?

MR. MAC HARG: With respect to Mary Manning Walsh, I understand that they have been told a number of times in the past that cost reductions should be effected and this was not news to them.

THE COURT: Now, look, Mr. Mantzoros, it isn't sufficient to tell me they have a job to do. I have spent enough time on this case that I do not want to have to have commitments made to this Court violated and if the commitment should not have been made, it should not have been made, but a commitment was made and I will sit here right now and find it for you.

MR. MANTZOROS: One out of three hundred, if your Honor please. How about the others that were approved by Budget?

THE COURT: That is no answer to me.

MR. MANTZOROS: You are picking one out and

Budget has a job to do as far as their functions are concerned.

THE COURT: Don't tell me about a job to do. The job is to be honest with the Court.

MR. MANTZOROS: These are all Article 78's. They have had their appeals. They can go right to the state court in Albany.

THE COURT: You are getting off the point. Please sit down.

MR. MANTZOROS: We have a man from Budget.

THE COURT: I asked you to sit down.

MR. MANTZOROS: We have a man from Budget, if your Honor please.

THE COURT: If I ask you a question and address a point to you, you are going to stick to the point or be excluded from the hearing. I cannot have you rambling on five points.

I am asking you to sit down and I am going to find the transcript.

(Pause)

THE COURT: All right. We had a discussion on December 17. At that time, purusant to my request, a representative of the Budget Director was here and his name was Mr. Webb and commencing at page 20 of that transcript, and going through page 31, there was a very lengthy discussion of a procedural problem which had been raised -- that is, the thing that had been raised was the possibility that the Budget Director could make representations in this court, or commitments to this Court, and then at some later time, after relying on those representations and commitments, I might find out that the Budget Director was not ready to follow through.

What I am saying is that the Health Department might make commitments, representations which I would rely on, which the attorneys here would rely on, and then at some future time, we would wake up and the Budget Director would not go along.

Now, that was eleven pages of discussion in which I made it clear that I did not expect the Budget Director to give a blank check to the Health Department and I so stated, but I would just like to read you a couple of selections.

Page 22, Mr. Webb stated to me as follows:

"We rely upon the Department of Health, in the first instance, for their analysis, both in quality of care point of view as well as some cost impact. That rate is, as you know, submitted to us for our approval. If it is a legitimate appeal based upon the analysis of the Department of Health, that is part of our rate system and rate approval system.

"THE COURT: And the money will be paid, right, Mr. Webb?

"MR. WEBB: That is true."

That is the end of that quotation.

Now, there were a number of pages of subsequent discussion because I did not want Mr. Webb stuck with some broad blanket position which he couldn't sustain, but the way it was left was really a little refinement on what was stated at page 22, and that was this:

It was represented to me, and I requested that this be done -- let me start again.

I stated that a representative of the Budget Director was welcome to be in court at every minute of every hearing and again I stated that I did not expect the Budget Director to give the Department of Health a blank check to do or commit any and all things in this litigation, but I said I could not, from a procedural standpoint, be dealing with the state in lots of voices and I had to expect that if the state, through Dr. Cicero or through somebody else at the Department of Health, made representations to me about rates or made commitments, I would assume that those were acceptable to the Budget

Director unless they raised a question immediately and it was agreed by Mr. Webb that that would be the case, and I read to you the following --

MR. MANTZOROS: May I interrupt, your Honor, please?

THE COURT: No, you may not.

(Pause)

THE COURT: I read from pages 30 and 31. I stated as follows:

"As long as there is a court proceeding, I would expect to be able to deal with Dr. Cicero and have him be the voice of the state, both for the Budget Director and the Department of Health, as far as this Court is concerned, unless you are with him and contradict him right there and then, and that means that you can be here at every minute that we have a hearing but if you are fully in agreement, then you don't have to be here but I am saying this, that I do not want to have to deal with Dr. Cicero one day and three weeks later deal with the Budget Director's Office.

"MR. WEBB: Agreed."

And there was, previous to that, a colloquy between me and Mr. Webb to the same effect.

Now, when we spent hours and hours of court time on December 22 and when the state came in that day and announced the new rates beginning January 1, I felt that I had a right to rely on the idea that those new rates would go into effect and be paid and if the Budget Director was going to hold those rates up or object to those rates or disagree with those rates or even question those rates, I was entitled to be told before we went through hours and hours of court time based on the assumption that those rates would be the rates.

Now, I don't care whether it is one home or thirty homes. One home is important here; each home is a case here, in effect, as far as I am concerned.

Now, what is the situation about the Budget Director's position as to the January 1 rates?

MR. MANTZOROS: We have a representative from Budget, pursuant to your request. Mr. Rollo has taken Mr. Webb's place, who has left Budget.

THE COURT: Okay. What is the position of the Budget Director on the rates that were announced to me on December 22, which would go in effect January 1?

MR. ROLLO: The Budget Director approved the rates without change. Mary Manning Walsh that we are talking about is an appeal for the entire calendar year 1976.

MR. MISHKIN: As I understand, there are certain rates in the January 1 list that have not been approved but that is not the point.

Mr. Rollo is correct. We are not focusing on that point but a specific promise by Dr. Cicero in relation to the expedited review process that --

THE COURT: I thought you were telling me that in certain cases -- if you weren't telling me, then I sure wasted a lot of everybody's time with a long speech, which I apologize for, and I was severely rebuking Mr. Mantzoros because I thought that what had happened was that there were instances where the January 1 rates are not approved by the Budget Director.

Is that the truth?

MR. MISHKIN: That is the truth but I wasn't even focusing on that. I think something more egregious is happening.

THE COURT: I don't want to get to something more egregious. Let's take one step at a time.

What is the situation where the state refuses to pay the January 1 rates?

MR. MISHKIN: I think Mr. Newman can tell you.

THE COURT: Why don't you?

MR. MISHKIN: The rate that was promised as of

January 1, 1977, has not been approved.

THE COURT: For what homes?

MR. NEWMAN: The Hebrew Home for the Aged at Riverdale.

THE COURT: What was the new rate? As of January 1.

MR. NEWMAN: The new rate as of January 1 that was sent out by the Department of Health for the Hebrew Home for the Aged as a skilled nursing facility was $63.17 and for a related --

THE COURT: Up from what?

MR. NEWMAN: May I finish the statement? I think it will clarify itself as I go along.

THE COURT: Sure.

MR. NEWMAN: For the affiliated operator, the Palisades Nursing Home, the daily SNF rate promulgated by the Department of Health was $75.02 a day.

THE COURT: You mean the January 1 rate?

MR. NEWMAN: The January 1 rate, yes, your Honor.

THE COURT: Was that an increase in the rates that had been in effect before January 1?

MR. NEWMAN: It was an increase of 4 percent over the rates that we thought should have been in effect but --

THE COURT: Don't tell me what you thought. Was there a rate in effect in November and December?

MR. NEWMAN: Yes. The rate for the Hebrew Home was $48, reduced from $63.

THE COURT: Look, could you just answer my questions?

MR. NEWMAN: I am trying to.

THE COURT: I didn't ask you what it was before November 1. I didn't ask you to argue the whole case. I just want to know what rate or rates were in effect in November and December.

MR. NEWMAN: Forty-eight dollars and change a day.

THE COURT: Now you gave me two figures for the January rate.

MR. NEWMAN: That's right.

THE COURT: Was there just a single overall figure before? In November-December?

MR. NEWMAN: A single -- no. I am talking now about the rate for the Hebrew Home as distinguished from the Palisades Nursing Home.

Perhaps if we keep it just confined for the moment to the Hebrew Home, it will be easier to understand, at least for me.

THE COURT: Let's do that, then. Let's start again.

What was the rate as of January 1, 1977 for the Hebrew Home?

MR. NEWMAN: The rate that was announced by the Department of Health for the Hebrew Home was $63.17.

THE COURT: All right. Now, was there a rate for the Hebrew Home that was in effect beginning November 1 and was in effect until January 1?

MR. NEWMAN: Yes, there was, your Honor.

THE COURT: What was that?

MR. NEWMAN: Forty-eight dollars and change.

THE COURT: Let's call it $48.

Now, is it your understanding that there is some problem about receiving the $63.17 rate beginning January 1?

MR. NEWMAN: Yes, there is, your Honor.

THE COURT: What is that problem?

MR. NEWMAN: The problem arises out of the fact that the Budget Director has refused, in a communication dated January 27, 1977, to approve for payment a revised rate promulgated by the Department of Health in recognition of a mistaken classification previously assigned to the Hebrew Home by the Department of Health.

THE COURT: In other words, the Budget Director is refusing to approve the $63.17 rate; is that what you are telling me?

MR. NEWMAN: Quite right, your Honor.

THE COURT: Now, Mr. Rollo, what about that?

MR. ROLLO: The Budget Director received an appeal for the calendar year 1976 for the Riverdale rate. He turned that appeal down by letter.

In approving the January 1 rates, we approved a rate of $63, as I mentioned. We now believe that approval to have been an error.

However, it is the existing rate for the January 1-March 31 period which was sent over to the Department of Health and certified by us and that is where it stands.

THE COURT: I am not clear from what you said where anything stands.

I just want to know a simple fact:

Will the Hebrew Home at Riverdale be paid or will it not be paid, beginning January 1, the rate of $63.17?

MR. ROLLO: Based on existing approvals, it would be paid. Those may be changed.

THE COURT: Well, that doesn't give me much of an answer. You can see my problem.

MR. ROLLO: At this point, I have nothing before me and if the Health Department were to revise that rate and send it over, it would be changed. If they did not, it would not.

THE COURT: So you are saying it is strictly up to the Health Department?

MR. ROLLO: At this point.

THE COURT: What do you mean at present?

MR. ROLLO: The present approved rate, the one he read, $63.

MR. NEWMAN: I would like to be heard on that, your Honor. May I?

THE COURT: Sure.

MR. NEWMAN: If I may be forgiven for using a slang expression, we are faced with a shell game.

The Hebrew Home has now received on three different occasions the approval of the State Department of Health for the increased rates that result from a reclassification by size of the Hebrew Home and the Palisades Nursing Home; three times.

The Bureau of the Budget, the Division of the Budget, forgive me -- and, incidentally, Mr. Rollo has been consulted by telephone at times -- the Division of the Budget on January 27 wrote a letter to the Department of Health saying:

"We think that the Hebrew Home is engaging in subtle machinations. We also think that programmatic factors do not support your determination. As a result, we refuse to approve the increased rate that you, the Department of Health, have now three times approved and certified."

THE COURT: The trouble is I just can't follow you. I don't know what you are talking about. I don't know when this happened. It just doesn't help.

MR. NEWMAN: I can give you the dates. Can I give you a document that gives the dates?

THE COURT: Can we stick to the point and can I ask you this:

Look, Mr. Rollo and Mr. Mantzoros, can't we at least eliminate some issues here and can't we get a very quick clarification as to whether there is any problem about the $63.17 rate?

Now, there may be other issues about the Hebrew Home but at least it would help me to know whether I could rely on the January 1 rates.

If there is a genuine problem and if the

Budget Director is seeking to evade or avoid those rates or something like that, I've got to know it. That is the implication. That is the atmosphere which they are trying to create here.

Now, if that is true and it is more than just atmosphere, I certainly want to know it. If it is not true, we all want to know it.

If there are isolated cases where the Department of Health believes that a mistake was made and they are going to change it, then let's know that, but I can't get from Mr. Rollo's statement anything that, really, I feel very solid about regarding this problem.

What do we do?

MR. MANTZOROS: From what I heard, they are talking about some ratings, so there are other disputes and not the issue of the rate itself.

THE COURT: No, wait a minute. You stick with me. It would help me an awful lot if you listen to me and you stick with my question.

I am asking you point blank, do you know whether the state is going to pay the Hebrew Home at the rate of $63.17 beginning January 1 or not? Do you know?

MR. MANTZOROS: No, sir. I haven't had a --

THE COURT: Can't you find out?

MR. MANTZOROS: Certainly. That is why we wanted the extension of time, your Honor. I haven't -- I just met Mr. Rollo fifteen minutes before court started.

MR. MISHKIN: Your Honor, we are getting way off. I started this aspect of the discussion based on --

THE COURT: You are not concerned about the $63.17, is that right?

MR. MISHKIN: I am very concerned about it and the way it comes up is through a letter to you dated January 6, 1977, from Dr. Cicero --

THE COURT: Is this part of your affidavit?

MR. MISHKIN: Yes, it is -- promising not only the increase to the Hebrew Home --

THE COURT: What is the exhibit?

MR. MISHKIN: "A" to the Wade supplemental affidavit -- not only the Hebrew Home but Walsh and Loretto were made specific promises that have not been rejected.

THE COURT: Let's look at the January 6 letter. This is Exhibit A to the second supplemental Wade affidavit.

This doesn't have anything to do with the 63.17, does it?

MR. HALLISEY: Yes, the last paragraph on page 1 and the second paragraph on page 2, of the letter dated January 6, 1977, from Dr. Cicero. It mentions relief to three homes, your Honor.

THE COURT: But it says, "Executed new 1976 cost based rates," and I don't see any reference to a figure of $63.17.

Where is it?

MR. NEWMAN: May I offer it, your Honor?

THE COURT: All right.

MR. NEWMAN: This is a photocopy of a hospital memorandum issued by the Department of Health over the name of Joseph M. Giglo, Deputy Commissioner, and also endorsed by Dr. Frank T. Cicero, and attached to it is one page of a schedule of new rates to be effective January and February and March 1977, and on that page, I have lightly checked the rates for the Hebrew Home for the Aged and the Palisades Nursing Home and those rates are, respectively, $63.17 and $75.02.

MR. MISHKIN: Your Honor, the discrepancy between the $60 you see in the letter and the $63 appeared on the listing of the January 1 rates and it is because the $60 in the letter was supposed to be the rate for November and December, and then with their 4 percent trending, starting January 1, it was to go up to 63.

THE COURT: Look, look, I have been talking for the last half-hour about the January 1 rates.

Now you direct my attention to a letter which is talking about 1976 rates.

MR. MISHKIN: Forgive me, your Honor. I referred you to that letter at the start of this conversation.

THE COURT: I don't care about that. I am asking a question and I want to know about the January -- if I am pursuing an issue which is not an issue, you tell me and I will desist as quick as a flash.

MR. MISHKIN: I think it is an issue.

THE COURT: I thought you told me that as to some of the rates that were announced to go into effect January 1, 1977, I thought you told me that as to some of those rates, the Budget Director was, in effect, reneging.

MR. MISHKIN: That's correct.

THE COURT: Is that a contention?

MR. MISHKIN: Yes, it is a contention but the point I was making, more as an aside rather than having to do with why we are here today, is that the very problems with Budget that we foresaw five or six weeks ago are coming to pass, but it really is not the central reason that we are here because even had Budget approved --

THE COURT: If you don't want to pursue it, I don't want to.

Shall we drop the point? Will you cease referring to it? Because I will --

MR. MISKIN: I will not refer to it further today but I do think it is an important factor that the problem with Budget exists and that is all.

THE COURT: And you are saying that -- look, Mr. Mishkin, I want to know from you, I am interested if there is any problem that you want to refer to. I am interested as a threshold issue in pursuing the question of whether there is any reneging on the commitment for the January 1, 1977 rates, because I understood, and maybe I am mistaken, but I understood that that was one of the things you were claiming, but maybe I am putting it a little harshly, the word "reneging," but let me rephrase it.

I had understood that you were saying that, in a few instances at least, the Budget Director was refusing to approve the rates which had been announced in December that would go into effect January 1, 1977.

Now, if you don't make that contention and you don't intend to refer to it, I will never refer to it but I am telling you, you will never refer to it either. I will drop the subject. I have got enough work to do without chasing mirages.

What is your position? Do you want to refer to it or not?

MR. MISHKIN: Yes, I want to refer to it but I don't think it has any independent legal significance for our purposes here today.

THE COURT: What do you wish to refer to it for?

MR. MISHKIN: As I said earlier--did I understand your Honor to say when do I want to refer to it or for what purpose?

THE COURT: For what purpose?

MR. MISHKIN: To underscore the point we made six weeks ago that even if the Department of Health tells you and us and the homes that rates have gone up, they have not necessarily gone up, but the problem that we are confronting today --

THE COURT: Then you are saying that this situation is evidence of that fact, right?

MR. MISHKIN: Yes, it is, your Honor, but apart from that, there are other reasons we are here today. That is just a point.

THE COURT: And you don't want to let me explore that and you don't want to give me any information on that now?

MR. MISHKIN: Your Honor, I think the information that you need on that has been provided in the Wade affidavit.

THE COURT: What is that information?

MR. MISHKIN: The letter of January 6 which Dr. Cicero sent to your Honor --

THE COURT: But that doesn't even refer to the January 1, 1977 rates. It is so hard to get anywhere.

MR. HALLISEY: Your Honor, that letter gives a base for the January 1, 1977 rates. You have got to have the base to understand the January 1, 1977 rates.

That letter to you of January 6 lays the foundation upon which the rates are going to be promulgated for January 1, 1977, so what the confusion is is that we must start with that rate to understand the January 1, 1977 rates.

Now, what --

THE COURT: I am going to say this. None of you are addressing my question.

I will drop it but I don't want to go back to it and I am telling you right now, I don't want to hear any further reference in this hearing to any contention that the state is refusing to honor the January 1, 1977 rates. That question is at rest.

I have spun my wheels on it for a long time now. I will spin them no longer and I won't hear about it, period. That is the end of that argument.

Okay, Mr. Mishkin, what further points do you have to make?

MR. NEWMAN: Your Honor --

THE COURT: I am hearing from Mr. Mishkin. Thank you very much.

Mr. Mishkin, you go to the other points and we will not spend more time on that.

MR. MISHKIN: I am now focusing on the review process that was promised more than a month ago and I am here to report, and it is contained in the Waife affidavit, that that process has resulted in no relief being granted to any facility and because of that, we now are in a very serious situation with many homes across the state, as I started to say earlier, who can not meet their payroll, who are on the verge of terminating their operations and, as we set forth in great detail in the Waife affidavit and the exhibits thereto, that if the cuts suggested by the defendants were actually to be implemented, the health and, indeed, the lives of patients would be placed in jeopardy.

THE COURT: I want to know this:

At the time of our earlier hearing, I studied carefully your brief on the law and I recall vividly going through the brief and seeing references to the words "reasonable costs" or other similar phrases.

I remember equally vividly finding nowhere any elaboration or explanation to show my why the state had acted in a way that violated the requirements of reasonableness.

The basic thrust of that brief -- in the first place, you never even dealt with the question of reasonableness, there wasn't a word about it in there and the real gap was this, that there was a lot of complaint about the fact that costs were not being met, that rates were reduced, all of which was very interesting and, undoubtedly, very, very important to the parties involved but, basically, they were talking about actual costs or actual losses and the translation of that into reasonableness, in my view, was simply not made in your submission and it may be that a home is drastically affected by being asked to cut its budget by one-seventh or one-eleventh, or whatever these amounts are, but I tell you that that does not even begin to show me anything about the concept of reasonableness.

Now, I want to go through with you and I want to just start right now on the legal argument and I want you to assume for the moment that you are explaining this to me afresh and I want to know what your positions are and I want to know what you refer to and I want to have a thorough analysis of your legal argument.

MR. MISHKIN: All right, your Honor.

THE COURT: What is violated here? Are you claiming a violation of procedural due process, a violation of a statute? What are you claiming? And I want to trace with you your argument and the reason I am doing that is because I am telling you it was not satisfactorily traced in your brief.

MR. MISHKIN: Well, we attempted to deal with it, as best we could, your Honor, and would you like to hear the procedural points or the substantive points first?

THE COURT: What are your points? The grounds of your action, what are they? What constitutional provisions or statutory provisions?

MR. MISHKIN: Under the Medicaid Act, there is a requirement that starting July 1, 1976, Medicaid reimbursement rates for residential health care facilities will be on a reasonable cost related basis.

Prior to July 1, 1976, there was no federal standard for how you determined Medicaid rates and so prior to that time, state law was the source of the standards.

Now, in 1975, the existing state statute, Section 2807-3 of the Public Health Law, provided that Medicaid reimbursement rates to residential health care facilities --

THE COURT: You are going back and you are giving me the state standard in effect before July 1, 1976?

MR. MISHKIN: Yes.

THE COURT: What was that statute?

MR. MISHKIN: That was reasonably related to the cost of efficient production of services.

THE COURT: And that is --

MR. MISHKIN: Public Health Law 2807-3. That was in effect in 1975.

So, in 1975, your Honor, the homes that are before you, the members of this class, had their rates determined under that standard which I have just referred you to -- reasonably related to the cost of efficient production of services.

Now, at the beginning of 1976, as your Honor knows, and we have detailed in the papers, instead of calculating new rates, as they were required to do under that standard which I have just read, the 1975 rates were frozen.

Now we come up to November 1976. At this point, your Honor, November 1976, the state has eliminated the Public Health law standard with respect to residential health care facilities and the --

THE COURT: You mean they have eliminated.

MR. MISHKIN: -- 3807-3, reasonably related to the cost of efficient production.

THE COURT: What point did that -- was 2807-3 repealed or what have you?

MR. MISHKIN: No. It was just specifically made inoperative with respect to residential health care facilities in that omnibus --

THE COURT: What was the date it was made inoperative?

MR. MISHKIN: March 30, 1976. I think it was Chapter 76 of the laws of 1976, which you have copies of.

THE COURT: And that was effective March 30, 1976?

MR. MISHKIN: That's right.

THE COURT: Now, just a minute. What became inoperative?

MR. MISHKIN: The federal statute as of July 1, 1976.

THE COURT: Let's go back to March 30. The statutes that became operative as of that date were --

MR. MISHKIN: No, there was no longer a state standard.

THE COURT: Are you sure?

MR. MISHKIN: Well, there are other parts of Article 26 of the Public Health Law which refer to reimbursement rates. There is the prudent buyer concept you have heard about, and the direction in Chapter 76 to tie reimbursement to a rating system.

THE COURT: Well, let's be very specific.

Now you are saying that as of March 30, 1976, this 2807-3 became inoperative?

MR. MISHKIN: As to residential health care facilities. It still applied to hospitals.

THE COURT: Okay. Weren't there substitute --

MR. MISHKIN: There was no substitute for that standard, your Honor.

THE COURT: Look, Chapter 76, Section 11.2(e) says:

"During the period beginning January 1, 1976 and ending March 31, 1977, the Commissioner may determine and certify to the Director of Budget rates of payment for residential health care facilities without regard to the provisions of Subdivision (3) of this section."

And I guess that is 2807-3.

MR. MISHKIN: Yes.

THE COURT: So that eliminates 2807-3 but it goes on and says:

"The Commissioner is directed to formulate such rates in accordance with the provisions of paragraph (c) of Subdivision (1) of Section 2803 and Section 2808 of this Chapter, which rates shall be effective for the periods hereinbefore specified in this paragraph, notwithstanding any inconsistent provision of Section 2808."

Now, that gives us 2803-1(c) and 2808, so you can't say that there was -- at least the statute provided some substitute, at least as far as I have read, right?

MR. MISHKIN: I would not call it a substitute for that standard. It directed it to other provisions to do certain things in connection with reimbursement. There was no standard -- I may be engaging in semantics but I think there is a difference.

THE COURT: What is the effect, regardless of the semantics? What is the effect of 2803-1(c) and 2808?

MR. MISHKIN: Well, 2801(c), is it?

THE COURT: 2803-1(c).

MR. MISHKIN: That was the creation of a rating system. The Department of Health was told to rate residential health care facilities.

By the way, they were not told to rate them on any basis.

THE COURT: Just a minute. 2803-1(c) is talking about rating system.

Does 2803 by its terms provide a standard for reimbursement or not?

MR. MISHKIN: It does not talk about reimbursement.

THE COURT: All right, doesn't talk about reimbursement.

So, then, what about 2808? Does it talk about reimbursement?

MR. MISHKIN: Yes. 2808 is a section which was added in 1975 and, in effect, it says that the Department of Health should adopt the prudent buyer concept for services and supplies just as in Medicare, which has been in existence for quite a while.

In other words, they said to the Department of Health what Medicare does in determining whether someone is a prudent buyer of supplies and services you do, too.

THE COURT: So that is a standard, isn't it?

MR. MISHKIN: Well, in a sense, it tells the

Department of Health that they can disallow costs. I don't think it is at all a standard of reimbursement. It says certain costs which a prudent buyer would not incur in buying supplies and services, as in Medicare, should not be allowed.

THE COURT: Well, it says the Commissioner, and it is the Commissioner of Health, isn't it?

MR. MISHKIN: Yes.

THE COURT: "The Commissioner shall promulgate interim regulations to expire no later than the 31st day of December 1976 that will relate the rate of payment for each residential health care facility to the operation and program management of the facility as well as the quality of patient care provided by the facility.

"Such regulations shall be consistent with regulations promulgated under the provisions of Title 18 of the Federal Social Security Act, by which payment for costs incurred by a residential health care facility for a quantity and quality of supplies or services necessary for the proper operation of the residential health care facility shall not exceed those which would be paid in the normal course of business by a prudent buyer for such supplies or services."

Okay. Now, that, at least, was in effect.

(Pause)

THE COURT: Where in your briefs do you analyze the regulations under the Medicaid Act?

MR. MISHKIN: Starting on page 11, your Honor, of our memorandum in support of the motion for a preliminary injunction.

THE COURT: Well, you quote the Medicaid Act. Where do you analyze the regulations?

MR. MISHKIN: Starting at the bottom of page 11, we cite at length the regulation.

On page 12, there is a lengthy quote from the regulations on the meaning of reasonable costs.

THE COURT: On the purpose, but I mean in a real analysis of the regulations. Do you give me that?

MR. MISHKIN: No, your Honor.

THE COURT: Is there any other quotation and view set out? It seems to me there is relevant language in some of these regulations. I could go on at some length unless I miss something in your briefing, however, that I don't think was there.

Look at Section 250.30, subdivision (a), subdivision (3), subdivision (iii), A and B.

250.30, subdivision (a), subdivision (3)(iv), A.

250.30, subdivision (a), subdivision (3)(iv), D, Then is the next step the effectiveness of the Federal Medicaid Act?

MR. MISHKIN: Right. Now, your Honor, we come up to November 1 of 1976, when we have these new rates that are put into effect and you must remember that as of November 1, 1976, virtually every facility in the state was now operating under their 1975 rates, which had been determined in accordance with the state standard that then existed, reasonably related to the efficient production of services.

Now, as of November 1 --

THE COURT: Wait a minute. Is there any problem about the Federal Medicaid Act? In other words, were there procedures -- obviously, those words are not self-executing. They are vague standards, and were there procedures to implement the standards under the Federal Medicaid Act?

MR. MISHKIN: Well, there were regulations which were promulgated on July 1, 1976 by HEW.

THE COURT: Are those regulations relevant?

MR. MISHKIN: Yes, and they are included in our previous papers, your Honor, but --

THE COURT: Well, let's talk about the regulations under the Federal Medicaid Act, then.

E and F, and so forth.

This really talks about the methodology that is to be used by the state, and so forth, and I just am not sure you ever went into that.

MR. MISHKIN: Your Honor, I think insofar as the meaning of the standard, reasonable cost related basis, there is not in the regulations themselves a great deal of discussion of that or how you apply that.

THE COURT: Oh, really? Have you looked? Have you read them?

MR. MISHKIN: Yes, I have.

THE COURT: In one of the regulations that I referred to, there is the idea that the state's reimbursement scheme must have two components.

The first component is allowable costs, and that is defined at length -- costs of meeting certification standards, costs of routine services, et cetera.. And all of that is defined at length.

The second basic element is stated that the reimbursement scheme must set rates not lower than the level which the state reasonably finds or reasonably expects to be adequate to reimburse in full the actual allowable costs of a facility that is economically and efficiently operated.

You don't think that language is relevant?

MR. MISHKIN: I did not say it wasn't relevant.

THE COURT: Did you ever mention it in your brief? Where is it?

MR. MISHKIN: That language is not cited in our brief.

THE COURT: It is not. Okay.

Now, going on, there is the statement in another phase of the regulations:

"States are to have great flexibility in defining allowable cost items and setting a reasonable value on these items. They may consider incentives toward efficiency and upgrading quality of care.

"States may set rates to provide an incentive to qualified facilities to participate in the Medicaid Program. They may figure a reasonable rate of return for pro it for homes in their formula for reimbursements.

"States can set payment rates on a class basis, if the criteria for classifications and rates set are reasonable.

"States may set for each class a second reduced rate to be paid to facilities with operational deficiencies."

MR. MISHKIN: Your Honor, we have --

THE COURT: I don't know that you ever even began to deal with this.

MR. MISHKIN: Our allegation was the state had not complied with any of that.

THE COURT: How can you tell me that they had not when you don't brief it?

MR. MISHKIN: We thought that there was no need to go into the details of the regulations which were attached to our papers. Certainly, on a motion for a preliminary injunction, we did not feel at that point it was necessary to try the case. We alleged they had not complied with the regulations.

THE COURT: Well, you know, that is a big -- I am just saying, I am trying to illustrate to you what I am convinced of, that your brief was superficial and did not even begin to provide a legal basis for a preliminary injunction.

Now, there may exist a basis for a preliminary injunction. After you do a lot of work in analyzing these provisions, there may be a basis, and telling me how they are or are not complied with and if you don't want to do the work, you might as well fold up, because you are not going to get any injunctive relief.

I have done the work -- not I, but my office has done the work in digging into these regulations which you did not do. We should not have had to do it.

MR. MISHKIN: Your Honor, I really do think there is no question from our brief that there are serious questions going to the merits of this complicated case and given that --

THE COURT: Okay. Look, if you are satisfied, Mr. Mishkin, and you don't want to do anything more on these issues, then don't.

MR. MISHKIN: Your Honor, it is not a question of not wanting to do anything more. It is a question of being at a point now, ten weeks after the lawsuit was commenced of finding these homes unable to make necessary payments --

THE COURT: You see, you keep -- it is the simplistic approach to tell me that there are homes which are suffering and I say to you that that does not make the case because, basically, what you are continually telling me is that they have actual costs in excess, and so forth.

MR. MISHKIN: No. That the previous rates which have now been reduced were set under the very same kind of standards you just read from. In 1975, the state standard was reasonably related to the cost of the efficient production of services.

THE COURT: Are you telling me that the state cannot review that and that the state cannot say that we now find that there are inefficiencies and there need to be reductions?

Are you saying that the state is constitionally or under federal statute stuck and precluded from any review and any change?

MR. MISHKIN: No, your Honor, but starting July 1, 1976, they are stuck with the federal law which continues the reasonable cost basis. It continues on the same basis that they used in 1975.

THE COURT: All right. Let's go on.

I just wanted to illustrate to you my problem because when you are dealing with millions of dollars of taxpayers money in New York State and you want a broad preliminary injunction, I don't think you get it without a very, very thorough presentation and very thorough analysis of every single relevant regulation. And if you don't do it, I am afraid I am going to.

Let's go on.

Now, you had the Federal Medicaid Act and you had the -- what procedures were to be followed under the Federal Medicaid Act? Was it simply self-executing? Did it immediately and somehow impose something on the state, or were there procedures to be followed?

MR. MISHKIN: No, not in the statute. It simply set a standard against which the new rates would be measured and that they must, in order to comply with the statute, be on a cost related basis. And we have not submitted that that is a simple question, but it is difficult.

However, given --

THE COURT: But weren't the states asked to come up with a plan by December 31?

MR. MISHKIN: Yes.

THE COURT: Is that irrelevant? I mean, is that --

MR. MISHKIN: I don't know that it's been submitted.

THE COURT: I am trying to ask you, as I understand it, under one of the regulations, Section 250.30(a)(iii), a state plan, a reasonable cost reimbursement based state plan was to be submitted to Health, Education and Welfare December 31, 1976.

Now, did that have anything to do with the application of the federal standard or not?

MR. MISHKIN: To the extent the submission is going to consist of or has or does consist of part 88 or part 86-2, which are the state regulations which embody the methodology for the new rates that were announced on November 1, 1976, yes, of course they are relevant.

THE COURT: Did the state submit a plan, Mr. Mantzoros?

MR. MANTZOROS: I understand yes, your Honor.

MR. MAC HARG: The methodology was submitted to HEW before December 31.

THE COURT: What submission was made? I mean, is it in a document?

MR. MAC HARG: It was in the form of part 86-2 of the regulations.

(Pause)

THE COURT: Look, I would like to know more definitely what was submitted to HEW. Say that again.

MR. MAC HARG: The submission to HEW, as I understand it, your Honor, was part 86-2 of the regulations of the Department of Health.

THE COURT: Was it submitted in some letter or was there some document?

MR. MAC HARG: I am sure there was, your Honor.

THE COURT: Could I have a copy of that when you furnish your papers?

MR. MAC HARG: We will be glad to.

THE COURT: Mr. Mantzoros, in your submission, is this timing with HEW relevant? In other words, for starters, as I understand it, the state was required to submit this plan to HEW December 31, 1976, and I would like to have a copy of the exact document submitted and a definite copy of what is referred to, so I am not under any misapprehension.

Now, what is being done now and what was intended to be done after December 31, 1976? Would HEW review it and what would be done? And what has been done?

MR. MAC HARG: Part of the state plan, your Honor, which does require federal approval but has nothing to do --

THE COURT: Is there a time when the federal approval is supposed to occur?

MR. MAC HARG: I believe within ninety days, your Honor, but, as I should point out, this has nothing to do with 1976 rates.

THE COURT: Just a minute. We are in 1977 now and if there is going to be any injunction, I assume we are talking about now and something in the future.

MR. MAC HARG: Under the federal requirement, these regulations or methodology would only pertain to rates to take effect January 1, 1978.

THE COURT: All right. Is it then irrelevant to our present problem? We just don't worry about that?

MR. MAC HARG: I would say so. We would take the position, your Honor, that regardless of the effectiveness of any of these requirements, we have been in compliance with reasonable cost standards throughout.

MR. MISHKIN: That is what the lawsuit is about, your Honor.

THE COURT: I know that.

The question is, what are those standards? If you are talking about federal standards, I can guarantee you that I don't get a lot of light out of the phrase "reasonable cost related basis."

MR. MISHKIN: I can understand that.

THE COURT: The question is, what does it mean and every bit of evidence about what it means is relevant, I guarantee you, and that means the analysis of the regulations and how they apply to this situation.

MR. MISHKIN: But it has been our allegation from the beginning and will be our allegation at trial that the state ignored all of those requirements and simply made a budgetary decision.

We will allege as a factual matter that there was never any consideration of the actual or reasonable costs of these homes or how they might be efficient or how efficient they have been in the past or how prudent. None of that was ever considered.

THE COURT: We will take a short recess now.

(Recess)

THE COURT: What I am wondering, gentlemen, is this:

If we are worried about compliance with federal statute and federal regulations, it would seem to me that it would be mighty important to see what the agency felt about that.

Now, if a review by the agency is now taking place, then that is an important consideration. I am a little confused on the timing, though, at the present moment because for some reason from a prior hearing, I had the idea that the review would be this spring and I had the date in mind of March 31, but now I see in this regulation, which I have before me, and it is under a heading -- I guess it must be 250.29, because it is right before 250.30--

MR. MAC HARG: Is that 45 CFR, your Honor?

THE COURT: Right. It is a very, very long regulation and I am having trouble finding the number. Maybe it is just an introductory language in part 250. But it is in Volume 41, Federal Register, Page 27305, and it appears to be some introduction to 250.30, about three paragraphs before the start of that regulation, and it says:

"The regulations require that the initial cost reporting period begin no later than January 1, 1977 and that states set reasonable cost related rates no later than January 1, 1978 on the basis of cost data submitted by providers."

What I am trying to get at is the significance of that to our case. In other words, is HEW making a review and is the literal effectiveness of the act somehow dependent upon the timing of this review, and when will the review take place and when will we know the results of the review and what bearing does that have on our case?

I don't know that I can exclude the fact that it might have a very important bearing in one way or another. I know there are problems of timing but these are all questions that are extremely complicated and have bearing on our problem.

So, what do you say about any of that?

MR. MAC HARG: Your Honor, I can't give you a definite answer on that question as to timing without checking back and finding out when we can expect an answer from HEW and so on. I really don't know.

THE COURT: Was there any date -- does that date March 31, 1977 mean anything to you?

MR. MAC HARG: I think that would only be in the context of the ninety-day period that I mentioned. Ordinarily, they are expected to react on submissions of state amendments within ninety days.

This has not always happened, as your Honor is aware.

THE COURT: Any way to expedite it?

MR. MAC HARG: We can do our best.

THE COURT: Could you be in touch with HEW?

MR. MAC HARG: Certainly.

THE COURT: What is the situation, Mr. Mantzoros? I think I have to get your position.

Now, what the plaintiffs are saying is that the review was not carried out in good faith but we sat here solemnly in court and contemplated a good faith review where viewpoints and information could be exchanged, where the Department of Health would listen with some objectivity to the representations of the nursing homes and where there would be something that we could call an impartial review.

Now, they are saying that that did not happen, that it was just a preconceived budgetary thing, that Dr. Cicero was simply dictating reductions to comply with preconceived budgetary restrictions.

Well, I know that budget exists but, really, if that was the case, it wasn't what was represented to me would take place.

MR. MANTZOROS: From a factual standpoint, I think it has taken place.

Dr. Cicero is not here, but there is a submission to the Court of which I don't have a copy:

"The thirteen facilities and the entire review process has now been completed and enclosed herewith is a full set of the deliberations."

I haven't seen the deliberations so if they exist, there's muchmore than what has been represented this morning.

THE COURT: How much time do you need to reply to the papers?

MR. MANTZOROS: As a matter of fact, when they reply, I intend to renew the motion of a summary judgment so the whole issue of the law will be briefed. My briefs contain it in fragmented parts.

THE COURT: It was very fragmented.

MR. MANTZOROS: I know but it is still there.

THE COURT: I am not trying to be critical but I have a serious problem here because of the quality of

V

the briefing and I don't say that in any personal way because if I were writing the brief, I would probably do worse, but it is a practical problem to me to look at briefs and find that I have got regulations that nobody has analyzed and your brief, really, it was almost incomprehensible, Mr. Mantzoros, so it was a great frustration.

MR. MANTZOROS: Our briefs did hit the issues, but these were not -- the question is this, your Honor:

The statute of the prudent buyer from 1975 was never challenged. If they are saying here, you have regulations under that statute, you did not apply them correctly or under the constitution, that is not a case of constitutional dimensions.

THE COURT: I am saying to you that I will give you one week from today to reply.

You have got a lot of material from Dr. Cicero already formulated and, certainly, on the law you must have done the legal work up to now, so I will give you one week to reply.

That is perfectly reasonable in view of the fact that this application was basically dormant since December 22 and the plaintiffs are coming in with a lot of detailed material and the state has to have at least a week to reply. I will give you a week.

MR. MANTZOROS: May I ask for a few more days. If I and my clients were down here, I would get it for you in five days, but I do have that problem of the delivery. I have a problem --

THE COURT: I have to adjourn this. The reporter has to go. I give you a week and I will set a hearing date promptly.

MR. MISHKIN: I need fifteen seconds:

Because of the position we are in with our clients and the closing and the harm to patients, I must ask that you enter an order, we would hope granting the injunction as requested, but if you feel that you cannot do that, then denying it at the earliest possible time. The situation is that bad.

THE COURT: You have let this thing dangle from December 22.

MR. MISHKIN: Your Honor, I must --

THE COURT: The affidavit of Mitchell Wade was filed January 31. Now, you cannot possibly expect to have a determination in a complicated thing like this, you cannot expect it in less than a week or ten days' time. I mean, it is an impossibility.

Now, if everything had been briefed thoroughly, it might be a different matter but this is -- you are just not facing up to what you have to show to get this relief. You are just not facing up to it and I will give the state a week to reply. I think that is a minimum time. I will set a hearing promptly and decide it as promptly as I can and that is all I can say.

Now, if in the meantime some particular nursing home is literally about to close, I will hear about that.

If you want to have a hearing about Mary Manning Walsh next week, we can do that.

MR. MISHKIN: This is an important matter and we ask for an early date.

THE COURT: I am dating the application from the time you submitted the affidavit, which was January 31. I will do the best I can.

MR. MISHKIN: Your Honor, that is not fair.

(Court adjourned)

-o0o-

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------------------------------X

NEW YORK ASSOCIATION OF HOMES :
FOR AGING, INC., et al.,
:
Plaintiffs,
:
- against - 76 Civ. 5113
:
PHILIP TOIA, et al.,
:
Defendants.

----------------------------------X

NATHAN KLUGER, et al., :
Plaintiffs, :
- against - : 76 Civ. 5233
PHILIP TOIA, et al., :
Defendants. :

----------------------------------X

N. Y. STATE HEALTH FACILITIES ASSN.,
Plaintiff, :
- against - : 76 Civ. 5320
PHILIP TOIA, et al., :
Defendants. :

----------------------------------X

New York, N. Y.
February 9, 1977

Before:

HON. THOMAS P. GRIESA,
District Judge

APPEARANCES:

PROSKAUER ROSE GOETZ & MENDELSOHN, Esqs.
Attorneys for Plaintiffs
BY: JEFFREY A. MISHKIN, Esq.
DAVID J. STERN, Esq.

KELLY & HALLISEY, Esqs.
Attorneys for Mary Manning Walsh Home
BY: JAMES V. HALLISEY, Esq..

LOUIS J. LEFKOWITZ, Esq.
Attorney General of the State of New York
Attorney for Defendants
BY: GEORGE C. MANTZOROS, Esq.
Assistant Attorney General
and
DONALD MacHARG, Esq.
Counsel, State Health Department

HANCOCK, ESTABROOK, RYAN, SHOVE & HUST, Esqs.
Attorneys for Plaza Nursing Home, Inc.
BY: BRUCE G. SODEN, Esq.

THE COURT: The way the matter was left when we concluded the hearing of December 22 was that the plaintiffs' attorneys and the Department of Health representatives would cooperate in providing for an expedited appeal from the existing rates for anybody who wished to appeal.

When I say "existing rates," obviously I am referring to the November rates as modified by the January 1 rates.

However, my understanding was that there would be an expedited appeal to review the situation of any homes that claimed that they were in urgent financial condition and had a right to some change of the rates of November 1 as modified by the January 1 rates.

As I indicated at the very brief hearing we had February 4, beginning a couple of weeks ago or so, a lot of communications started coming in to my chambers indicating that there was a remaining dispute or disputes that were unresolved as a result of those procedures.

On February 4 the plaintiffs announced that they were renewing or again seeking relief under their motion for preliminary injunction. They stated that there were a few homes that were in urgent condition. We set up today's hearing to deal with those alleged urgent situations.

The immediate thing to cover, it seems to me, is exactly what was done in connection with these appeals and what are the homes whose cases are being presented today. Is the Mary Manning Walsh Home one of them?

MR. STERN: Yes, your Honor.

THE COURT: And then Margaret Tietz, is that another?

MR. MISHKIN: No.

THE COURT: What are the ones you want to present?

MR. MISHKIN: The Loretto Rest Nursing Home, the Plaza Nursing Home in Syracuse, and the Mohawk Valley Nursing Home. Mary Manning Walsh your Honor has already indicated.

THE COURT: Yes. How do you want to go about presenting it?

MR. MISHKIN: I think we would simply like to call Mr. Norman Harper from the Loretto Rest Home first, your Honor.

THE COURT: All right. Incidentally, who is here from the state? Dr. Cicero?

MR. MANTZOROS: No. Dr. Glenn Haughie, Deputy Commissioner for Health Care Standards. We will also have Mr. Rollo from the Budget Office so that they can answer and respond to any information.

THE COURT: All right. Call your witness, please.

NORMAN E. HARPER, called as a witness in
behalf of the plaintiffs, being first duly sworn,
testified as follows:

THE COURT: Let me note again the homes we are going to deal with today.

MR. MISHKIN: Loretto, Mary Manning Walsh, Plaza, and Mohawk Valley. These homes, your Honor, are offered as examples of the --

THE COURT: They are offered because of their individual situations; right? All right, let us go ahead.

DIRECT EXAMINATION

BY MR. MISHKIN:

Q Mr. Harper, would you tell us your position, please?

A I am the executive vice president and administrator of Loretto Geriatric Center.

Q And you testified previously in this case, is that correct?

A Yes.

Q That was on December 7?

A Yes.

Q Just to refresh our recollection, would you tell us what your Medicaid reimbursement rates were prior to November 1, 1976?

THE COURT: I have the notes of that right here.

MR. MISHKIN: Fine.

THE COURT: Let me just check that.

Was this one of the cases which were reviewed in December?

MR. MISHKIN: Yes.

THE COURT: Do you remember that the state provided me with three or four writeups of reviews? I had those a few minutes ago and I can't find them at the moment in my papers. I just wanted to get all the materials about Loretto together before we start the testimony.

I guess it was not one. So we will proceed.

MR. MISHKIN: But, your Honor, it was one of the homes that was reviewed in December.

THE COURT: One of my problems, and I don't want to get bogged down in this, is that there were some materials presented to me in December which were never marked as exhibits. I think it ought to be part of the record so that it is not just miscellaneous sheets of paper floating around.

For instance, there were three documents presented to me with the caption of the case and purporting to contain findings of fact and summaries of conclusions.

MR. MANTZOROS: We did that up in 506, if I remember, December 17, your Honor.

THE COURT: That is about right.

MR. MANTZOROS: Yes.

THE COURT: And these documents related to St. Cabrini, to Margaret Tietz, and to Mohawk. Mohawk is one of the facilities we are dealing with today. Also Daughters of Sarah.

I just think that perhaps we ought to have these documents marked for identification, so that they will somehow have some formal standing. Shall we have these marked as defendants' exhibits?

MR. MANTZOROS: Yes, your Honor.

MR. MISHKIN: Your Honor, I would object to their being marked as exhibits and received in evidence. There has been no foundation as to what those documents are and who created them. If they wish to have them marked for identification, that is all right.

THE COURT: Let us have them marked for identification, and then we will worry about --

MR. MANTZOROS: As I recall, we did that, and at the time Dr. Cicero testified under oath using reference to those documents marked for identification on December 17, if I recall. I will doublecheck the record on that, your Honor.

THE COURT: Have you got an exhibit list, Mr. Mantzoros?

MR. MANTZOROS: No, sir, not with me.

THE COURT: Have you got it elsewhere?

MR. MANTZOROS: Yes, your Honor, I have it at the office, and I will check that for you. I will get that this afternoon or tomorrow for you.

THE COURT: I don't even know what exhibit numbers we are at.

MR. MANTZOROS: We were using A, B, C, D. I have a recollection about that, your Honor. I will doublecheck the record for you.

THE COURT: Let us call these AA, BB, CC, DD. All right? Do you want to mark these? Mark them for identification, then.

The writeup that I have been referring to as Mohawk is marked Defendants' Exhibit AA for identification; the writeup about Margaret Tietz Nursing Home is marked Defendants' BB for identification; the writeup about Daughters of Sarah is marked CC for identification; and the writeup about St. Cabrini is marked DD for identification.

(Defendants' Exhibits AA through DD marked for identification.)

xxx

THE COURT: Do you have an exhibit list, Mr. Mishkin?

MR. MISHKIN: We have one for the plaintiff, your Honor.

THE COURT: I think both of you ought to keep exhibit lists for both parties.

Back to the rates, Mr. Harper. The testimony, as I understand it, is that prior to November 1 the Loretto Home was receiving reimbursement at the rate of $53 for skilled nursing and $36 for intermediate; right?

THE WITNESS: Yes.

THE COURT: Then under No. 1 there was a reduction to $42.30 for skilled and $27.14 for intermediate.

Then at some point my notes show that as a result of an appeal there was a revision to $48.13 for skilled and $31.94 for intermediate. Is that right? That was before January 1.

THE WITNESS: Those latter rates have not been authorized and paid by the local commissioner. They have not received the money.

THE COURT: We will get along a lot better if you can answer my question. I don't think I got those figures out of thin air. I got them on two or three pieces of paper in front of me in my notes. Do you know what they refer to?

THE WITNESS: Yes.

THE COURT: What do they refer to?

THE WITNESS: They refer to rates --

THE COURT: Were my figures correct?

THE WITNESS: Yes.

THE COURT: What were they?

THE WITNESS: $48 and change. I don't have it in front of me.

THE COURT: Right. And 13 cents.

THE WITNESS: Yes.

THE COURT: What were they?

THE WITNESS: Those were rates that were computed by the Health Department during the initial stages of the appeal.

THE COURT: Sometime in December.

THE WITNESS: Yes.

THE COURT: I was told that they were approved by the Health Department.

Isn't that right?

MR. MANTZOROS: Yes, sir, certified and approved.

THE COURT: Then sometime in December, before the

January 1 date, right? Indeed, I think these were announced at some hearing about mid-December.

MR. MISHKIN: December 10, your Honor.

THE COURT: December 10.

Now you are saying that they were to go into effect when? Is this retroactive or what?

THE WITNESS: To November 1.

THE COURT: Have you by now received reimbursement for the month of November?

THE WITNESS: Yes.

THE COURT: AT what rate did you receive reimbursement for November?

THE WITNESS: The $53 and $36 rate for November.

THE COURT: Is that correct?

THE WITNESS: Yes, it is correct. We received reimbursement at the $53 and $36. However, based on the $42 rate and $27 rate, the county alleges that we were overpaid during the month of November by some $95,000.

THE COURT: But is the county doing anything to collect that?

THE WITNESS: Yes.

THE COURT: What is the county doing?

THE WITNESS: They threaten that that will be an offset against the check that we will receive mid-February.

THE COURT: For what month?

THE WITNESS: We will receive in mid-February a check for January billing. But we have an outstanding liability for an alleged overpayment in November.

THE COURT: Before we get to all that, this is the first I knew that your home had received reimbursement for November at the old rate. Have you told me that before?

MR. MISHKIN: That happened in the middle of January, your Honor.

THE COURT: Did you have that in any papers submitted to me?

MR. MISHKIN: Yes, we certainly did. In the second supplemental Waife affidavit.

THE COURT: Fine. That is good.

Then did you receive reimbursement for the month of December?

THE WITNESS: Yes.

THE COURT: At what rates?

THE WITNESS: At the $42 rate and the $27 rate.

THE COURT: When did you get your November reimbursement?

THE WITNESS: Mid-December.

THE COURT: When did you get your December reimbursement? Mid-January?

THE WITNESS: Mid-January.

Q You received this from a county?

A Yes.

THE COURT: What county?

THE WITNESS: Onondaga.

THE COURT: What are you saying the position of Onondaga County is? What have they announced to you?

THE WITNESS: They are saying that they wish to collect a $95,000 overpayment for November, and they plan to collect this by an offset against our January billing, which we hope to collect in mid-February. They want it by means of a check. We have been advised to bring in a $95,000 check in order to receive back from them the gross billing.

THE COURT: How do they calculate the $95,000?

THE WITNESS: That would be the difference between what we received for November care at the $53 and $36 rate, and the most recent certified rate that they have, which is the $42 and $27. That differential amounts to $95,000 per month.

THE COURT: Mr. Mantzoros, let us get that cleared up. Do you know why they received $53 and $36 for November? Does anybody know why?

MR. MANTZOROS: Yes, your Honor, I think Dr.

Glenn Haughie here. May we swear him in? If you recall, your Honor, Dr. Cicero was sworn in. He can answer the questions and be under oath. He is a Deputy Commissioner and he has the information on that.

THE COURT: What is your name?

MR. MANTZOROS: Dr. Glenn Haughie.

THE COURT: And your position?

THE WITNESS: Deputy Commissioner for Health Care Standards in New York State Department of Health.

THE COURT: Why don't you just take the oath.

(The oath was administered to Mr. Haughie by the Court.)

THE COURT: Would you explain your version of what we have talked about in the last few minutes?

MR. HAUGHIE: Yes, your Honor. I believe that the $42 rate and the $27 rate for an HRF facility was promulgated at a time when the facility's rates had not been established from previous cost experience. Shortly thereafter, the new rates, based on the facility's cost experience, were promulgated, and those figures are $48.13 for the skilled nursing facility and $31.54 for the health-related facility.

I don't know the date which those were officially promulgated, but I would assume that it was probably somewhat after the 1st of November, and that the local Department of Social Services had information which prompted them to pay, I think, a $53 rate and the $36 rate for that first month.

Then, as information came to the local Department of Social Services of the $42 rate, that that was the basis of payment for the December rate.

THE COURT: Let us complete the picture. Was there any change for Loretto as of January 1?

THE WITNESS: Yes.

THE COURT: Why don't we get that?

THE WITNESS: The January 1 rates were certified at $50.10 for the skilled and $32.73 for the HRF.

THE COURT: What was the last figure?

THE WITNESS: $32.73.

THE COURT: Before we go any further, what I would like to know is the position of the state as to what rates should be applicable here; and if we can get that defined, then we can hopefully straighten out any administrative errors or lags. All right?

Mr. Mantzoros, consult with your people. What is the present position of the state as to what rates should be in effect for what periods of time?

MR. MANTZOROS: Dr. Haughie will tell you.

MR. HAUGHIE: Your Honor, for the period November 1, 1976, to 12/31/1976, the nursing home rate would be $48.13 and the health-related facility rate would be $31.54.

THE COURT: Is it $31.54?

MR. HAUGHIE: That is the figure I have, your Honor.

THE COURT: I have 54 in one place and 94 in another, but that is not important. Let us assume it is $31.54. That is what you are giving me.

What can be done to straighten that out? They have actually received rates different from that for both November and December. So what do we do?

MR. HAUGHIE: Your Honor, I believe that this can be straightened out through the State Department of Social Services and the Onondaga Department of Social Services.

THE COURT: How quickly?

Mr. Harper, have you figured out what would be the net effect if the rates were adjusted in accordance with what Dr. -- is it Dr. Haughie?

MR. HAUGHIE: Yes.

THE COURT: -- Dr. Haughie just mentioned? And I am just talking about November-December. We will get to

January and so forth later.

Have you figured that out?

THE WITNESS: It would result in an annual loss for 19 --

THE COURT: No, I am not talking about an annual loss. I am talking about, for those two months, let us suppose adjustments were made so that you were reimbursed for both months for skilled nursing at $48.13 and intermediate at $31.54. Would that mean a net payment to you or a net refund? Do you understand my question?

THE WITNESS: Yes. It would result in an almost perfect wash. The differential for the December would approximate the $95,000 overpayment for November. Therefore, there would be no cash coming to the home. It would only have the effect of eliminating the liability to the county that we are looking at of $95,000 but no cash.

THE COURT: I am worried about things like "almost a wash." I don't know whether people are talking about $5,000 or zero dollars or $1. Hasn't anybody got a figure?

MR. HAUGHIE: Your Honor, I don't at the moment, but I think that we can calculate it quickly.

THE COURT: Can you calculate it? Have you calculated it, Mr. Harper?

THE WITNESS: Yes. When I say "almost a wash," it's within two or three thousand dollars.

THE COURT: If anybody can get up the exact exact figure in the next little while, I think it would be helpful.

MR. HAUGHIE: Your Honor, we may be lacking actual patient days for those two periods, which will make it a little difficult to get you the answer that I thought you could get.

THE COURT: Somebody ought to have it. Maybe Mr. Harper's people can get it.

Beginning January 1, Mr. Harper said that the rates that were announced were $50.10 and $32.73.

Is that correct?

MR. HAUGHIE: That is correct.

THE COURT: Is there any problem about putting those rates into effect? If this Court and, you know, if there were no court action and no appeal action and so forth, would the rates, beginning January 1, be indeed $50.10 and $32.73?

MR. HAUGHIE: Yes, your Honor.

THE COURT: Who is here from the Budget Department

MR. ROLLO: I am, your Honor.

THE COURT: Are you saying that that is what will be paid beginning January 1?

MR. ROLLO: Yes. We have approved those rates.

THE COURT: What?

MR. ROLLO: We have approved those rates.

THE COURT: So they have been approved by both the Health Department and Budget Department?

MR. ROLLO: Yes.

THE COURT: Has there been an administrative appeal from any of these rates, and obviously what I am talking about are the two rates that are now agreed to be paid. The rates for November and December are $48.13 and $31.54, and the rates beginning January 1, $50.10 and $32.73.

Has there been any administrative appeal from either or both of those sets of rates?

THE WITNESS: Yes.

THE COURT: What was that? Appeal from both?

THE WITNESS: Yes, because the $50 rate is really a trended-up version of the $48 rate.

THE COURT: You don't have to argue. I just want to know whether there has been.

THE WITNESS: Yes.

THE COURT: What happened on that appeal? Is there any record of what happened?

MR. MISHKIN: Yes, there is, your Honor; a letter to you dated January 6, 1977, from Dr. Cicero, stating that the Department of Health recognizes that Loretto needs $55 a day for its SNF and $39.51 a day --

THE COURT: You know, I told you, I had all that correspondence and I returned it. I want the correspondence marked if it is to be received in evidence, and so forth.

MR. MISHKIN: It has been annexed to the second supplemental Waife affidavit as Exhibit 1.

THE COURT: All right. Let me get that.

What exhibit is that?

MR. MISHKIN: It is the first exhibit in the second supplemental Waife affidavit, your Honor. It is the last paragraph on the first page.

THE COURT: All right. Let me ask you, Mr. Haughie, are you familiar with that letter of Dr. Cicero of January 6th?

MR. HAUGHIE: I am trying to find it right at the moment, your Honor.

Your Honor, Mr. Davidoff, who is an assistant commissioner in the department responsible for Health Facilities I understand may have some information to impart on that question.

THE COURT: Let's swear you, Mr. Davidoff.

(The oath was administered to Mr. Davidoff by the Court.)

MR. DAVIDOFF: Your Honor --

THE COURT: What is the situation about? If you don't have a copy of the January 6th letter, I am sure Mr. Mishkin will make it available to you.

MR. DAVIDOFF: I am familiar with it, your Honor. I helped prepare it.

THE COURT: What is that?

MR. DAVIDOFF: The references to Loretto in that letter were our Department of Health -- Dr. Cicero's -- estimate of what the appeal looked like to us at that point in time -- December 6th?

THE COURT: January 6th.

MR. DAVIDOFF: I beg your pardon. January 6th.

At that point in time. That was the letter that gave you our plan of action for reviewing the others as well.

It was a representation from the Department of Health as to our best estimate of what the appeal would turn out to be.

From that time until today, along with other matters, we have been in intense discussions with the Division of the Budget, narrowing and refining the basis upon which we could grant or certify and ask Budget to approve an appeal for this facility.

Those numbers as represented in that letter, although they were our best estimate at that time, are not our position today.

THE COURT: What is your position today?

MR. DAVIDOFF: Our position today is that we have analyzed both the SNF and HRF and made recommendations to the Division of the Budget very recently which would grant, if the Division of the Budget does indeed approve -- and Mr. Rollo is here -- which would grant sufficient funds to do away with the reported deficit of the facility, coupled -- if one couples that granted increase with cuts recommended by us and concurred in by the facility.

THE COURT: But can you translate that? We have been dealing with reimbursement rates.

MR. DAVIDOFF: Yes, sir.

THE COURT: Can you translate that?

MR. DAVIDOFF: Our proposal, which Budget has, as I say, only recently received -- and I fully understand you want a concerted answer to these questions from the state representatives --

THE COURT: All I want is what you are able to give me. If you haven't reached your conclusion --

MR. DAVIDOFF: We have.

THE COURT: Then you have got to tell me. But if you have, then I would certainly appreciate your stating it.

MR. DAVIDOFF: Yes, sir. Our proposal is not to change from the $50.10 figure of January 1, but to increase the HRF figure --

THE COURT: Just help me on terminology. I have been talking about skilled nursing --

MR. DAVIDOFF: I beg your pardon, sir. SNF -- when I said nursing home, I meant to say SNF.

THE COURT: Can't you just use "skilled nursing" and "intermediate?"

MR. DAVIDOFF: Yes, sir.

THE COURT: Is that okay?

MR. DAVIDOFF: Yes, sir. The skilled nursing rate, the higher rate, we recommend staying the same.

The intermediate facility, we recommend an increase in the magnitude of $4.18, which would bring the recommended rate to $36.91, based on a patient assessment conducted by our Syracuse staff.

THE COURT: Just a second, before you get to patient assessment. What that means is that the intermediate rate would go up slightly above the pre-November 1 rate by ninety-one cents?

MR. DAVIDOFF: That is correct. But it would leav the skilled rate $2.90 below the November 1 rate.

THE COURT: That means to me that issues on preliminary injunction for Loretto are narrowed to the following:

Is there any grounds for relief because of a reduction for November and December in both rates from $56 and $36 to $48.13 and $31.54, respectively, and is there any ground for relief for the period beginning January 1 because of a reduction in the skilled rate from $53 to $50.10? Because as far as the intermediate, it is actually, beginning January 1, being given a slight raise. And I think this actio of course, only seeks relief to keep in effect the November 1 rates.

So that is my starting point.

MR. DAVIDOFF: Your Honor, I failed to convey one very important fact.

THE COURT: Yes?

MR. DAVIDOFF: That is that the appeal that Mr. Harper referred to, and which I said would increase by $4.18, not only affects the January 1, 1977 rate but is retroactive and would cover the November 1 rate as well.

I did not communicate that to you. I apologize.

THE COURT: All right

MR. DAVIDOFF: The appeal is for the entire period November 1 on.

THE COURT: Does that go for the $50.10 also, for the skilled?

MR. DAVIDOFF: Our opinion on skilled does not change. That is to say, our decision would be not to increase it.

THE COURT: In other words, it is with the other rates on skilled.

MR. DAVIDOFF: On skilled.

THE COURT: But on $36.91 for intermediate, it is retroactive to November 1. Is that right?

MR. DAVIDOFF: Not the $36.91. The $4.18 add on. In other words, the $31.54 would be increased by $4.18 to $36.

THE COURT: Let us refine that. Would you please give me what your recommendation is for November and December as far as intermediate?

MR. DAVIDOFF: Yes, sir. The recommendation to the Division of the Budget for November and December, in the intermediate care, the rate we would recommend would be $36.72.

THE COURT: And then beginning January 1?

MR. DAVIDOFF: January 1 through March '77, for intermediate care, we would recommend $36.91.

THE COURT: That eliminates all issues as far as intermediate. That is all there is to it.

MR. MISHKIN: I think it does, your Honor, if that money is actually paid. As I just understood Mr. Davidoff, the budget has not approved that yet.

THE COURT: What can you tell us, Mr. Rollo? I think you had better join the witness list.

(The oath was administered to Mr. Rollo by the Court.)

THE COURT: What can you tell us, Mr. Rollo, from the standpoint of the Bureau of the Budget?

MR. ROLLO: Your Honor, as Mr. Davidoff points out, we have had it a very short time and we indeed have. We have had it, I think, six workdays. We have not acted on it yet.

THE COURT: And you are not prepared to make any commitment on it.

MR. ROLLO: No.

THE COURT: All right.

MR. MISHKIN: Your Honor, I think the request for an injunction, at least as it applies to Loretto, must be viewed in the context of this letter of January 6, because on December 22, at page 126 of the transcript, of December 22, you received assurances from the state that we were talking about the period November and December, and that anyone with particular problems would have an expedited appeal and that period would be treated. Then you get this letter dated January 6 telling you that, yes, the Loretto, they are entitled to $55.90 and $39.51. Again we hear the surprise announcement that, no, we didn't really mean that; here is something new. We have never heard this before.

I think, your Honor, in view of the --

THE COURT: It says a partially completed patient assessment review. I can't say that that is a commitment on the state that binds them.

MR. MISHKIN: Your Honor, I think --

THE COURT: It may be an interesting piece of evidence, but it is not a commitment. A partially completed assessment review.

MR. MISHKIN: I would like to know what is taking place since January 6.

THE COURT: We will go into all that. But that was not an ironclad commitment. It was not a stipulation, and that is all there is to it. It may be evidence, it may be interesting, but it is not a commitment.

Mr. Rollo, when will the budget department have its mind made up?

MR. ROLLO: I would hope this week, your Honor.

THE COURT: You mean by --

MR. ROLLO: Friday.

THE COURT: By tomorrow? This is Thursday.

MR. MANTZOROS: Wednesday.

THE COURT: Wednesday.

MR. ROLLO: I think by Friday.

THE COURT: Can we get word immediately in some form?

MR. ROLLO: Our normal procedure in an appeal, your Honor, is to notify the Health Department by phone, and it is my understanding that they often notify the facility by phone immediately.

THE COURT: All right. But I think in this case it would be good to -- well, you manage that.

Does anybody know why Dr. Cicero would put the $55 figure in a letter addressed to me, copies to everybody? What was the point? Did he not think that I would rely on it and other people would rely on it? I think it is a rather serious step.

MR. DAVIDOFF: I think I can respond, your Honor.

THE COURT: Yes?

MR. DAVIDOFF: At the time that Dr. Cicero returned from that hearing, he was very anxious for us to convey to you, as a department, and hopefully as the state, but primarily as a department, prompt action on assessing those thirteen facilities in the first priority group, as you recall.

He also wanted to show the progress we were attempting to make on the appeals, as contrasted with management assessments, on the appeals we actually had in-house. Hence, he referred to three facilities.

The letter was intended to be an indication of where we stood, and in fact your reference to a partially completed review was designed to indicate what our best thinking was at that moment, January 6.

In point of fact, one of the things we thought was going to come to fruition, namely a change in one of the ratings, a part of the services rendered in the facility, was not supported by staff who have that responsibility.

So we had a partial aspect of the $55 number taken away from us.

THE COURT: I told counsel that I did not, you know, as this deluge of papers rolled into my office, review all of this at the time. It was really in a disorderly kind of fashion that it was coming in. But did the Department of Health ever write any updating or correction of that?

MR. DAVIDOFF: To you?

THE COURT: To anybody.

MR. DAVIDOFF: To the best of my knowledge, no, your Honor.

THE COURT: Mr. Mishkin says this is the first he heard of any change from the proposal of $55.90.

MR. MISHKIN: No, that is not correct, your Honor. The last time we were in court, one of the reasons we were here is that we had just heard the budget had not approved any of the rates of the January 6 letter.

THE COURT: But had you ever heard of any change of the department?

MR. MISHKIN: That I am hearing for the first time right now.

MR. DAVIDOFF: I think that is correct, your Honor.

THE COURT: Why was that?

MR. DAVIDOFF: Our normal --

THE COURT: It is really unfortunate to spring this in court. It would have been much better to discuss this with the parties, with Loretto Home, outside of court. The whole point of trying to get the Department of Health and the nursing homes together was with some idea that they consisted of sensible people on both sides and that if they got together and exchanged information, something, at least some spadework, would be done so everything did not have to be gone over in minute detail in this court.

MR. DAVIDOFF: I understand that, sir.

THE COURT: Some progress was obviously made, but from my standpoint it is quite inefficient. I don't say that I relied on the January 6 letter, because, again, I did not put all these things together. But I can see why the plaintiffs would rely. I would expect them to rely until they heard something different.

Now we have from January 6 all the way to February 9, and no indication of any change in the Department of Health position. If you had kept them up to date, then there would have been some give and take and maybe we would not have to start all over again. I just don't appreciate this.

MR. DAVIDOFF: Your Honor, there was communication with the facility in the form, which is typical of our dealings with facilities, in the form of contacts between Mrs. Wall and her staff and the controller of this facility.

THE COURT: Did Mrs. Wall ever tell them that there was going to be a change from the Department of Health position as to a $55.90 figure?

MR. DAVIDOFF: Yes, sir.

THE COURT: Mrs. Wall, when was that done, and you take the same oath.

(The oath was administered to Mrs. Wall by the Court.)

THE COURT: What happened about this?

MRS. WALL: I was talking to Mr. Komurak, at the controller, and I told him --

THE COURT: You were talking to whom?

MRS. WALL: Mr. Komurak at the controller.

THE COURT: What is his name, again?

MRS. WALL: Komurak, K-o-m-u-r-a-k.

THE COURT: And he is the controller of Loretto?

MRS. WALL: Yes.

THE COURT: Did you give him some information?

MRS. WALL: I talked to him several times about the delay in processing the November change, the $48, why it had not gotten through to them, because he talked to me about it. At that time I told him that the $55 rate was probably not going to be approved.

THE COURT: When did you tell him?

MRS. WALL: Two weeks ago.

THE COURT: Were you talking about approval by the Budget Director or approval by the Health Department?

MRS. WALL: Both. I was talking about the fact that the $55 had two things in it: One was the change in the rating, and the other was the appeal on the nursing. I said that the Health Department was going to go on with the nursing increase, but the ratings had not been approved.

If they got a "Very Good" rating in nursing, there would be no ceilings, and that is what the $55 represented.

THE COURT: Can you keep your voice up just a little bit? Let us go into this a little more systematically. The $55 figure was based on what?

MRS. WALL: If they had received a change in their ratings to "Very Good," which meant that there would be no ceilings on the calculation, they would have received the $55. This is opposed to the way we evaluated it to see how much they were --

THE COURT: What is it rated now? "Good state"?

MRS. WALL: "Good state," right.

THE COURT: Was there any other element in the $55 figure?

MRS. WALL: I am not aware of it. Those are the two major things.

THE COURT: And at the time of the January 6 letter was it expected that they would get a "Very Good" rating?

MRS. WALL: I guess so, because that is the way I calculated that $55.

THE COURT: Mr. Davidoff, is that right?

MR. DAVIDOFF: Yes, sir, it is.

THE COURT: And what happened?

MR. DAVIDOFF: What happened was that the regional people and our central office people, who are in charge of the ratings, did not concur in the preliminary estimate that was given to us.

THE COURT: You mean about the rating?

MR. DAVIDOFF: Yes, sir.

THE COURT: Who did not concur?

MR. DAVIDOFF: The preliminary estimate that was given was by our regional people and a staff person in the central office. The people who have the responsibility for making those decisions, primarily in central office, did not concur when they reviewed all the information.

THE COURT: What was the issue?

MR. DAVIDOFF: The issue was whether the nursing services as rendered, in accordance with our guidelines and code and so forth, were entitled to be rated "Very Good" or "Good state."

THE COURT: There must have been some issue.

What was the issue that existed that prevented in this instance the obtaining of a "Very Good" rating? Do you know?

MR. DAVIDOFF: Sir, I do not know the specifics, but we have --

THE COURT: The difference between "Very Good" and "Good state" relates to what? What kind of thing would it relate to?

MR. DAVIDOFF: It would relate to the quality of the nursing -- particularly nursing, which is what we are discussing here -- the quality and level of nursing care provided, and also considered in that is the degree of efficiency with which that care was provided.

THE COURT: One thing I have never quite understood. If you are talking about quality of nursing, you are talking about, in my mind, degrees of skill and attention and so forth; right?

MR. DAVIDOFF: That is right.

THE COURT: In other words, whether bandages are changed skillfully or unskillfully or whether patients are kept clean or not clean; right? That kind of thing?

MR. DAVIDOFF: Yes, sir, that is correct.

THE COURT: In my mind that could be a function of money. In other words, you can have better and better nursing care if you --

MR. DAVIDOFF: Have the money to do it.

THE COURT: Yes. I don't mean that money is everything, but at least at first blush one could conceive that you could effect an improvement in some cases by paying either more nurses or better nurses; right?

MR. DAVIDOFF: Yes, sir. However, interestingly enough, our statewide experience in ratings shows that many facilities were able to receive a "Very Good" rating in a certain category at a cost level substantially below many others.

THE COURT: That may be true. I am just trying to take it very slowly.

MR. DAVIDOFF: Yes, sir. Normally, dollars would permit one to provide more care.

THE COURT: All right. In addition to the quality of the care, you said there was a factor of efficiency; right?

MR. DAVIDOFF: Yes, sir.

THE COURT: What do you mean by "efficiency"?

MR. DAVIDOFF: What we mean is that, for example, if a facility provided all its nursing care completely by registered nurses instead of the mix between registered nurses, licensed practical nurses and aides, or if one merely had nurse upon nurse upon nurse, as an example, almost tripping over each other --

THE COURT: A private nurse to every patient.

MR. DAVIDOFF: Right. Some exaggerated state of that sort, we would not characterize that as "Very Good," because that would not be efficient.

THE COURT: In other words, you crank two elements in: You weigh quality and how the quality is achieved.

MR. DAVIDOFF: Yes, sir.

THE COURT: If you had a wonderful quality, but it was achieved by having one registered nurse for every patient, then that would not get a "Very Good" rating.

MR. DAVIDOFF: It would not.

THE COURT: Because it would be inefficient.

MR. DAVIDOFF: Yes, sir.

MR. MISHKIN: Your Honor, may I just interject: The rating system and how it is marked, our contention is in this lawsuit, the rating system is used as a means of limiting reimbursement and not as Mr. Davidoff suggests.

THE COURT: That is a factual conclusion.

MR. MISHKIN: That is correct. But I just want to state on the record right now that we don't necessarily agree -- we do not agree -- with the statements that Mr.

Davidoff has made.

THE COURT: Naturally. I don't expect you to.

Was the facility apprised of this issue about "Good state" versus "Very Good" rating? Was that subject to some formal procedure where they heard and consulted and were allowed to argue about it and so forth?

MR. DAVIDOFF: My understanding, sir, is that an appeal on the rating or parts of the rating were in fact -- an appeal was in fact started by the facility.

We have a separate little appeal process separate from the reimbursement appeal process, where these matters are heard. It is an internal process. There is no provision for the facility coming to appear before this internal group. But their arguments and contentions are in fact submitted to the rating appeal board.

THE COURT: What I don't understand is this: I have got to go back and forth to some extent and I want to get back to Mr. Harper, but if there was an appeal with respect to the rates for the Loretto Home --

MR. DAVIDOFF: The rating or the rates, sir?

THE COURT: I am really concerned with the rates. The only reason I would ever get concerned with the rating is when it affected the dollars.

MR. DAVIDOFF: Right.

THE COURT: That is my only concern: the dollars. At least, that is my only concern in this lawsuit.

What I don't understand is this, and I guess I have to get into the whole chronology, but as of December 22 it was understood that there would be a review or an appeal with respect to Loretto. I don't know what went on, but I would assume that there must have been some procedure for Loretto to present its case to the Department of Health --

MR. DAVIDOFF: Yes, sir.

THE COURT: -- to get back to at least the November 1 rates. That may have involved many issues, I just don't know. It may have involved issues about the rating; it may have involved other issues. I don't know what was presented and what was not presented. But then you come along January 6 with a letter, and I would like to know, was the appeal process still going on?

MR. DAVIDOFF: Yes, sir, it was.

THE COURT: But it would seem to me that for the appeal process to be very meaningful, the Loretto Home would have to be pretty closely advised of the issues, so that there could be some meaningful give and take, and then apprised of a determination. I don't have confidence that that was done. The letter of January 6 announced a $55.90

rate, at least a tentative assessment of that.

MR. DAVIDOFF: Yes, sir.

THE COURT: Then I hear that Mrs. Wall casually mentioned to a Mr. Komurak that she did not think that that would get approved. Then we come into court and learn finally that it has not been approved.

I don't understand that kind of procedure, if you are talking about some kind of meaningful appeal or review. It would seem to me that there ought to be something where the issues are drawn, defined, they are heard on all the issues, they are given the findings, you know, and not just casual tidbits of conversation here and there.

MR. DAVIDOFF: I believe I can respond to that. We have approximately 800 facilities. Three quarters of them appeal every year. We are talking about nursing homes in long-term care. A minimum of three quarters appeal every year, some with merit, and some less so.

Our procedure is very loose and has been since 1969 -- or, actually, 1966. We get the appeals in various formats. We have a tremendous volume of them. We deliberate on them, keeping in mind principles we have had in the past. We communicate -- historically we have done this -- the final product to the facility. They have a right to be heard by a rate review board, again created within the

Health Department. If the rate review board finding -- I should say the rate review board makes its recommendation.

THE COURT: You are talking about rate, by which you mean dollars?

MR. DAVIDOFF: Dollars. -- make its recommendation to the Commissioner of Health, who then makes up his mind, based on the recommendation, and then sends that product to the Division of the Budget. This is the historical way we have attempted to --

THE COURT: What is the first stage? Who announces the initial finding?

MR. DAVIDOFF: The initial finding is announced--

THE COURT: Before it goes to the rate review board.

MR. DAVIDOFF: The initial finding is announced to the facility by the Bureau of Reimbursement Rate Setting.

THE COURT: Is that in writing?

MR. DAVIDOFF: In writing.

THE COURT: Has that been done in this case?

MR. DAVIDOFF: It has not, your Honor. The procedure I am describing was our normal course of business and in facilities not connected with this lawsuit continues to be our normal course of business, Because of the alleged hardships and the concerns of this Court, we attempted to get into a new and -- although this may sound odd to you -- a new and accelerated way of handling this.

THE COURT: I am sure you did. I am sure you did.

MR. DAVIDOFF: And hence the communication which would normally flow to each of the facilities in this case, that are in this case, did not occur. In fact, we have had hesitancies about doing things in our so-called normal course because of the guidelines being set in this court. That is why we didn't do that.

THE COURT: Let me get back to you, Mr. Harper. Let us see what problems are created, if any, by the difference. The only thing that remains to talk about is the difference between $50.10 -- wait a minute -- it is the difference between $48.13 and $53 for the period November and December, and the difference between $50.10 and $53 for the period beginning January 1. Because my benchmark is the pre-November 1 rates. It is not $55.90. It is the pre-November 1 rates.

I am just going to look back at my note for just a moment.

You may have given this before, but I will ask you again: Did your home incur a loss for the ten months through October 31?

THE WITNESS: Yes.

THE COURT: What was that loss?

THE WITNESS: Approximately $275,000.

THE COURT: What were your total expenses through October 31?

THE WITNESS: Approximately $5 million.

THE COURT: As of October 31, were you in arrears on your accounts payable or salaries, or what was your cash situation and so forth as of October 31?

THE WITNESS: We were in arrears one mortgage payment to the state.

THE COURT: As of October 31, arrears -- what, a monthly mortgage payment?

THE WITNESS: $68,000.

THE COURT: But was it a monthly payment?

THE WITNESS: Yes.

THE COURT: All right.

THE WITNESS: It was the October payment.

THE COURT: $68,000. Were you in arrears on other things?

THE WITNESS: We were in arrears on funding the operating escrow account.

THE COURT: You told me when we were together December 6 that generally the accounts payable were four months behind. Were you behind on your accounts payable in general as of October 31?

THE WITNESS: Yes.

THE COURT: How much were you in arrears on accounts payable generally as of October 31?

THE WITNESS: Approximately 90 days.

THE COURT: Let us assume that your rate for November and December is $48.13 for skilled and $36.72 for intermediate. What would your results be for November and December?

THE WITNESS: An operating loss of approximately $75,000 per month.

THE COURT: I wonder if you could make another assumption. Assume that the November and December rates were as follows: $53 for skilled and $36 for intermediate. What would the results be for November and December?

THE WITNESS: An operating loss of approximately $15,000 per month.

THE COURT: You lost an average in the ten months of $27,500 per month; right?

THE WITNESS: Yes.

THE COURT: Why would your loss be less in November and December? Why would it go down to $15,000 per month?

THE WITNESS: Because during the early part of the year we were operating under the assumption that the $53 and the $36 were interim or target rates, and we were awaiting the certification of 1976 rates. It was not until November that we saw the rates which prompted this lawsuit came out at of course much lower than $53 and $36.

THE COURT: What did you do, cut costs?

THE WITNESS: Yes.

THE COURT: So you cut costs, so that if you had had the old, what I will call the old rates, in effect, you would have cut your loss from $27,500 per month, approximately, to $15,000 per month?

THE WITNESS: Yes.

THE COURT: So you are saying that if you had gotten the old rates, there would have been a $30,000 loss for November and December, and the new rates would give you $150,000 loss. Right?

THE WITNESS: Yes.

THE COURT: I think in some of our earlier discussions we differentiated between cash loss and just a bookkeeping loss. At least the witnesses testified to that effect. I know Mr. Fischer testified to that effect. Let me see if you did.

Is there any of that $150,000 that represents just bookkeeping entries? I don't mean to slough off bookkeeping entries, but we are talking about whether somebody is in a cash bind and it might help to know at least what the cash flow situation is. Is there any part of that $75,000 per month loss that is not cash?

THE WITNESS: To the extent that the operating escrow fund is funded or not funded, it is a noncash item. We carry it as an expense, and it is referred to in the loss. However, that was not funded during the period and therefore it was not a cash outlay.

THE COURT: Is it supposed to be?

THE WITNESS: Yes. By the Health Department requirement we are required to fund the operating escrow fund.

THE COURT: In what form? You mean you actually put it in an account?

THE WITNESS: Yes. This facility has never --

THE COURT: When did you stop doing that?

THE WITNESS: This facility has never opened its operating escrow fund. It reached permanent financial --

THE COURT: So that you have not actually funded it ever?

THE WITNESS: Never.

THE COURT: How much does that involve?

THE WITNESS: To date it is $277,000.

THE COURT: How much per month?

THE WITNESS: I am not sure as to the effective date of our operating escrow account, and therefore I am unable to divide it. I know that the liability for 1976 was $277,000, but I am not sure of the exact date that it was triggered; therefore I can't convert it to a monthly figure.

THE COURT: Wasn't there an obligation? Did you have an obligation in November, in December? Would something be on your books for those months for the escrow fund?

THE WITNESS: Yes.

THE COURT: What would be on your books for November-December for escrow fund?

THE WITNESS: Well, you see, I am not familiar with this fund, because we have never funded it. So I am unable to convert the $277,000 annual figure to a monthly figure. We never opened the account even.

THE COURT: It makes a difference to me, because what you are saying, when you are talking about a $75,000 per month loss, if let's say $20,000 of that is -- how do you figure it if you don't know what the per-month escrow figure is? Did you put anything for escrow fund into your $75,000?

THE WITNESS: Yes.

THE COURT: What did you put in?

THE WITNESS: I don't have that with me today.

THE COURT: Can you find out quickly? Is there somebody you can call?

THE WITNESS: Yes.

THE COURT: Do you have any idea approximately?

THE WITNESS: My best judgment is that that $277,000 is a six-month -- no, it must be an annual figure. I would prefer to call, your Honor.

THE COURT: All right, you call. But it would be at least $20,000 a month, wouldn't it?

THE WITNESS: I prefer to call before I answer that.

THE COURT: All right, you call.

Now let us switch to the period beginning January 1. Can you give me an idea of what would be the results if you received, beginning January 1, what would be the per-month results, assuming the rates of $53 and $36? Let us just take for the first quarter.

THE WITNESS: Our costs for January are running $54.22 on the skilled and 38 --

THE COURT: Wait a minute. Costs for January?

THE WITNESS: $54.22 on the skilled.

THE COURT: And what?

THE WITNESS: And $38.73.

THE COURT: Can you translate that? What kind of estimates can you give me? Can you give me a per-month estimate for the quarter or can't you? Can you give me just January? What can you give me?

THE WITNESS: Appears to be a loss of approximately $10,000 per month.

THE COURT: For the first quarter?

THE WITNESS: Per month, yes, for the first quarter.

THE COURT: If your loss on the basis you have given me for November and December was $15,000, if you gave me a figure of a $15,000 per month loss, on the assumption of $53 and $36 rates for November and December -- do you recall that?

THE WITNESS: Yes.

THE COURT: -- then I take it that all these figures you have given me so far cranked in something for the escrow funding?

THE WITNESS: Yes.

THE COURT: Let us assume for the first quarter that your rates are $50.10 and $36.91, what would the results be?

THE WITNESS: A loss approximately between twenty and twenty-five thousand, assuming that we maintained the present nursing payroll.

THE COURT: Are you thinking of reducing the present nursing payroll?

THE WITNESS: No. Because as a part of our management assessment we reduced all expenses on recommendation of the Health Department, and we have been proceeding with our nusing staff in place, hopeful of receiving a patient mix appeal approximating some $4 per day, both on the ICF level of care and the skilled level of care.

THE COURT: Now we will take a break and you call and find out this escrow fund.

(Recess)

MR. MISHKIN: Your Honor, I believe Mr. Harper has obtained the relevant information.

THE COURT: All right, Mr. Harper. What was the figure for escrow fund for November and December?

THE WITNESS: $46,318 per month, and that is a required --

THE COURT: Repeat that.

THE WITNESS: $46,318 per month during 1976. And the letter that establishes that fee refers to Section 9 of the mortgage and refers to it as a cash payment.

THE COURT: But you were not making it.

THE WITNESS: We have not made it.

THE COURT: What is it for the first quarter in 1977?

THE WITNESS: The schedule is $41,384 per month.

THE COURT: Give me the figure again.

THE WITNESS: $41,384 per month. And I add, it is a required cash payment by the letter that establishes the schedule.

THE COURT: Who requires it?

THE WITNESS: The Department of Health as a part of the mortgage.

THE COURT: What is the purpose of this escrow fund deposited? It is to establish a means to pay the mortgage; right?

THE WITNESS: No. The mortgage is a separate commitment.

THE COURT: Then what is it?

THE WITNESS: It's a fund that is set aside for a variety of operating purposes. I am not sure exactly what the breakdown is, the technicalities. Mr. Davidoff is very familiar with it.

THE COURT: It is to insure certain --

THE WITNESS: Reserve for replacement and certain other operating costs, and you are required to fund in anticipation of those.

MR. MISHKIN: Your Honor, I think Mr. Davidoff would be best situated to describe it.

THE COURT: All right, Mr. Davidoff, what is it?

MR. DAVIDOFF: Thank you very much. The loan which forms the basis, your Honor, for this is a mortgage loan financed under Article 28-A of the Public Health Law. Coincidentally, the Health Department administers that loan program. It could well be any other agency.

The operating escrow fund being referred to here is to be distinguished from the mortgage repayment fund. This is --

THE COURT: Tell me about the escrow fund.

MR. DAVIDOFF: Yes. The operating escrow fund, this one we are describing, is to be used for equipment replacement and other reserves of that sort. The idea behind it, of course, is to make sure that the mortgaged premises are kept in repair so that the security is not impaired.

MR. MISHKIN: And it is a cash requirement?

MR. DAVIDOFF: Yes. Mr. Harper's statement was correct.

THE COURT: Let us go back. You said there was a $275,000 loss through October 31. I assume that that included $46,318 per month provision for escrow fund for that ten months; right?

THE WITNESS: No. The operating escrow fund started July.

THE COURT: How much was included in the $275,000 for escrow fund?

THE WITNESS: Approximately $200,000.

THE COURT: When did this facility start operating?

THE WITNESS: February 10, 1975.

THE COURT: 1975?

THE WITNESS: '75. It reached what they call permanent financial occupancy as of July 1, 1976, at which time a requirement to fund a cash reserve called the operating escrow fund began.

THE COURT: If we start with July 1, July, August, September, October, we have four months at $46,000; right?

THE WITNESS: Yes.

THE COURT: I get $184,000, a little less than $200,000. Let us call it $185,000.

THE WITNESS: I was under the impression that our default on the mortgage is linked to this. We are in default on both items in terms of funding them. We see them as equal responsibilities and certainly absolute cash responsibilities.

THE COURT: Have you made any mortgage payment since October 31?

THE WITNESS: No.

MR. MISHKIN: In fact, your Honor, I would like to introduce a letter from the Department of Health to Loretto, dated January 13, 1977, which threatenes mortgage foreclosure.

THE COURT: Let us have that letter. What is the next plaintiffs' exhibit?

MR. MISHKIN: 17. This is a letter --

THE COURT: Can we just have it marked for identification?

MR. MISHKIN: Yes.

(Plaintiffs' Exhibit 17 marked for identification.) xxx

THE COURT: Any objection to this being introduced?

MR. MANTZOROS: I have not seen it, your Honor. I just got a copy.

THE COURT: Any objection?

MR. MANTZOROS: No objection, your Honor.

THE COURT: Received.

xxx (Plaintiffs' Exhibit 17 received in evidence.)

THE COURT: In calculating the results for the periods we have talked about, have you included mortgage fund payments as an expense?

THE WITNESS: Yes.

THE COURT: And those payments are $68,000 a month?

THE WITNESS: Yes. We are four mortgage payments in arrears.

THE COURT: That is October, November --

THE WITNESS: December and January.

THE COURT: You told me you were in arrears one month as of October 31, but you have paid that?

THE WITNESS: No. The October payment due the 27th of October was not paid.

THE COURT: So you are in arrears for that payment, October 27 payment, November 27 payment, December 27 payment, and January.

THE WITNESS: Yes. We also have an arrearage of $167,000 for bond anticipation notes.

THE COURT: Just a minute. What is that arrearage?

THE WITNESS: $167,305.

THE COURT: What is that?

THE WITNESS: That is similar to a mortgage obligation. It is the difference between the actual permanent mortgage and the amount to be placed. It goes along with the mortgage and has the same power as --

THE COURT: What do you call it, bond --

THE WITNESS: Bond anticipation notes.

THE COURT: And these were borrowings you made earlier?

THE WITNESS: It is part of the mortgage commitment during the development period of the project.

THE COURT: When were those due?

THE WITNESS: They were due -- that number is due the 14th of February, 1977, in one lump sum cash payment of $167,000.

THE COURT: You mean you just won't pay those.

THE WITNESS: We are required to pay them.

THE COURT: You say arrears. You said you were in arrears, I thought.

THE WITNESS: Well, it is the 9th of February. On the 14th of February we will owe $167,000.

THE COURT: So --

THE WITNESS: It is an additional mortgage commitment.

THE COURT: Let us not call it an arrearage. It is just you will owe; right?

THE WITNESS: Yes.

THE COURT: What will you do about it?

THE WITNESS: We don't know. We assume that that will be treated in the same manner as the default on our mortgage.

THE COURT: Whom do you owe that to?

THE WITNESS: You pay that through the Department of Public Health also. It is to the Housing Finance Agency, I believe. We assume that when the foreclosure proceedings are instituted --

THE COURT: Is there anything that is included in your expenses such as a sinking fund or any gradual accounting for those $167,000 notes?

THE WITNESS: No.

THE COURT: So that would just be a February expense, or whatever, I don't know how you account for it. I won't go into that detail.

Let us go back to the $275,000 loss through October 31. If we take out $185,000 for escrow fund, we get that down to --

THE WITNESS: We are not sure we have the option to take that out.

THE COURT: No. But it has not been paid. I am not saying you don't owe it or there are not sanctions; I am just saying that it was not a cash item, because you did not pay it. All right? Maybe there are other noncash items, but at least there was that noncash item. And that gets your cash loss in the way I described it down to $90,000.

You also did not make a mortgage payment of $68,000, so if you just do that subtraction -- and I am not saying it has significance or not -- you are down to $22,000. The significance we will worry about in a minute.

Now going to the assumed cash loss -- the cash loss in November and December that you mentioned of $75,000 per month, or a total of $150,000, if we take out $92,000 of escrow fund we are down to $58,000. If you take out $68,000 from that because you did not make any -- no, you take out $136,000 for two months mortgage payments that you included there but did not actually make, that would give you a plus $78,000, if those items were just for purposes of illustration taken out.

Now let us go to the assumption that the pre-November 1 rates had remained in effect. In November and December, that is, $53 and $36. You said there was a loss, that that would have produced a loss of $15,000 per month, or $30,000. If we take out of that loss $92,000, that was not put into the escrow fund, we have got a plus $62,000, and if we take out the $136,000 mortgage payment item which was not made, you have got a plus of $198,000.

Let us go to January 1.

MR. MISHKIN: Your Honor, just one moment. I don't think --

THE COURT: Just one minute. I asked you to assume the rates of $53 and $36. You said it was a $10,000 per month loss for the first quarter. Let us just take the $10,000 per month. If we exclude from those figures the $41,000, we get a plus $31,000, even without worrying about mortgage payments. Then if we go to an assumption of the proposed rate of $50.10 and $36.91, which you said would produce a loss of twenty to twenty-five thousand--let us assume a $25,000 loss. Let us take out of the figures the $41,000 escrow fund, which gives us a plus $16,000.

I want to ask the state, Dr. Haughie, how does the state view the failure to pur money into the escrow fund? One way you can look at it is that reduction of rates has contributed to that. What are you going to do about that?

MR. HAUGHIE: Your Honor, there are two comments that I can make, and perhaps Mr. Davidoff, who some years ago assisted in setting up the 28-A program, can identify some additional information.

There is a commitment by the facility with the state for this 28-A mortgage, as I understand it, which is mortgage management provided by the Bureau of Facility

Finance within the Department. The letter sent by Mr. Streve, which was just introduced as Exhibit 17, represents our efforts to monitor the payment of funds both against the mortgage and the operating escrow account. The language of that letter spells out the position of the Department and its concern about the absence of payments to those funds.

The second point is -- again, Mr. Davidoff may provide some additional information inasmuch as he served within the Division of Health Care Cost Control until the past month or so -- there is included in the reimbursement rate a portion of that reimbursement rate to meet the capital cost of that facility, and it is expected that that portion is used to repay both the mortgage and -- I am not sure whether the operating escrow -- I assume the operating escrow contribution is also reflected in that.

THE COURT: I have got a much simpler question. We have got a motion for a preliminary injunction. I am told that there are homes that are in very serious financial condition because of the reduction of rates as of November 1, and I have been told about the fact that this has produced threats of imminent closing and so forth.

I am not attempting to work out the final ultimate solution of the financial picture of these homes at this hearing. All I have got to know mainly is whether some home is going to close because of these rates. That is why I want to know the facts that really deal with the imminent immediate question.

So I would just like to know: Is the state seeking to impose some penalty, or is it going to foreclose or do something because of the failure to make deposits in the escrow fund? They did not make the deposit beginning July 1 long before this lawsuit started. They have not made it now. So the so-called loss figures include amounts that were not paid. I don't mean they were not owed, but they were not paid. And it is the Department of Health that makes these requirements.

I am not saying it solves anything ultimately to temporize about this, but it is a fact. What is the state going to do about it?

MR. DAVIDOFF: May I, your Honor?

THE COURT: Yes.

MR. DAVIDOFF: No. 1, the state cannot temporize.

THE COURT: What?

MR. DAVIDOFF: The state cannot temporize.

THE COURT: What are you going to do?

MR. DAVIDOFF: We are going to make sure the money is paid.

THE COURT: In mortgage and escrow fund?

MR. DAVIDOFF: Yes.

THE COURT: What are they going to pay them with?

MR. DAVIDOFF: As Dr. Haughie pointed out, dollar for dollar, the debt service requirements of 28-A, all the categories that Mr. Harper described, are put into the rate as a first matter. I am not saying they are segregated dollars.

THE COURT: Dollar for dollar on mortgage payments.

MR. DAVIDOFF: Mortgage, escrow, the BA, bond anticipation notes -- all of those components that go under the heading of 28-A debt service costs. Every one of those described by Mr. Harper is supplied to the rate setting people by those people who service the mortgage in the Department.

THE COURT: You have not done anything so far.

MR. DAVIDOFF: Yes. And we should be taken to task by Wall Street, and I assure you we will be.

These bonds are part of the moral obligation fabric that has so occupied many courts and the state legislature and so forth. This is one mortgage under one of the moral obligation programs that the state --

THE COURT: You are talking about the mortgage. This is not the escrow fund.

MR. DAVIDOFF: The escrow fund is completely connected to the mortgage.

THE COURT: Because it secures --

MR. DAVIDOFF: It is one of the obligations of the mortgagor.

THE COURT: It protects the security.

MR. DAVIDOFF: Absolutely, and is relied on in the prospectus by the bondholders and so on. These bonds are moral obligation bonds. There are bondholders' reliances and expectations. These bonds were rated for Wall Street purposes, and we are in arrears, the facility is in arrears, but the Health Department is in arrears too.

THE COURT: That is fine, but let us talk about November and December for the moment.

MR. DAVIDOFF: Yes, sir.

THE COURT: Are you familiar or is Dr. Haughie familiar with the finances and the cash flow and so forth for that period of time?

MR. DAVIDOFF: Of this facility?

THE COURT: Right.

MR. DAVIDOFF: Well --

THE COURT: Literally, did they have the cash to make these payments?

MR. DAVIDOFF: Yes.

THE COURT: I know you say it was part of the rate, but indeed I am told that they were 90 days in arrears as of October 31 and that as of -- I mean, we can get this to December 1, the total accounts payable and so forth.

What were the accounts payable as of December 31?

THE WITNESS: $614,508.

THE COURT: Once more?

THE WITNESS: $614,508.

MR. MISHKIN: Mr. Harper, is that all-inclusive or are there any other obligations? I think we should have them all out on the table.

THE WITNESS: That is the accounts payable. We have the mortgage arrearage. We have the bond anticipation notes. We owe to Lincoln Bank a working capital loan of $215,000, which is a demand note.

THE COURT: But that was not in arrears; right?

THE WITNESS: That is correct.

THE COURT: What was the aging of the accounts payable as of December 31?

THE WITNESS: Some were as many as 120 days.

THE COURT: How much was delinquent, let us say 30 days or more, approximately?

THE WITNESS: I have that here, your Honor.

The aging of accounts payable were $169,000 over 120 days; $76,000 over 90 days; and $104,000 over 60 days.

I might add that with the revelation in our community of that letter to foreclose, the vendors that heretofore we have been able to deal with on 120 and 90 day basis are now getting extremely uneasy and they are putting us on a COD basis, in addition to which the bank who we owe that $215,000 liability is aware of the foreclosure letter and has demanded that note.

THE COURT: Then tell me about that. There has been a demand -- what is the bank?

THE WITNESS: To repay the -- the bank is Lincoln Bank.

THE COURT: Where is that located?

THE WITNESS: Syracuse. And due to what they see as a precarious situation of this facility --

THE COURT: Have they written you a letter?

THE WITNESS: No.

THE COURT: When did they make the demand and to whom?

THE WITNESS: They made it to our controller.

THE COURT: Don't you usually make a written demand?

THE WITNESS: They --

THE COURT: For a quarter of a million dollar note? What is the amount of the note?

THE WITNESS: $215,000. They have asked that we come in to have a conference relative to the note. They called last week and asked me that. Knowing that we had this hearing today and knowing that the rates and the retroactivity or possible retroactivity of the rates would be key to any plan that we might project to the bank, we asked them not to have that preliminary conference until after today.

THE COURT: Suppose that you got the pre-November rate, suppose that the pre-November 1 rates were restored for November and December, how much additional money would it yield to you over and above the figures of $48.13 and $36.72, that is, if the rates were $53 and $36 versus $48.13 and $36.72, how much money, how much additional funds, would you get, one versus the other? Are you with me?

THE WITNESS: I am with you. I understand the question, your Honor.

$300,000.

THE COURT: Let us suppose that for the period beginning January 1 you received reimbursement at the $53 and $36 rate instead of the $50.10 and $36.91 rate, how much more money comes up?

A $15,000 on the skilled unit, which is essentially where the difference is.

THE COURT: $15,000 a month?

THE WITNESS: Yes. I did that by -- there is 5,000 patient days per month on the skilled unit, and your problem was to take the difference between $50 and $53, which is $3 per day, times 5,323 days.

MR. MISHKIN: Mr. Harper, would you tell the Court what you have in the bank right now in terms of cash available to --

THE COURT: No, let me follow this. You would be getting a little more on intermediate and some less, so I would like you to figure out exactly what is the difference between $53 and $36 and $50.10 and $36.91. Can you do that?

THE WITNESS: Yes. It is $15,000 additional per month on the skilled. The ICF does 10,000 patient days, so we are talking about the difference of $1 a day or 91 cents.

THE COURT: Let us call it $15,000, all right?

THE WITNESS: Yes.

THE COURT: Let us just focus on the skilled for a moment.

THE WITNESS: Yes.

THE COURT: We go back to November and December. Again, the main difference is in the skill, isn't it?

THE WITNESS: Yes.

THE COURT: That is the difference of $48.13 versus $53, and you said it would yield, if you figured up that difference, it would give you a total of $300,000 more money; right?

THE WITNESS: Yes.

THE COURT: Or $150,000 a month.

You told me that if you go to January, the difference between $50.10 and $53 is $15,000 per month. I don't understand why the figure for November and December is ten times the figure you have given me for January but the differences in rate we are talking about don't seem so great. Is there anything wrong with your figures? Do you understand what I am talking about?

THE WITNESS: I understand what you are talking about, yes. The facility does 15,000 patient days per month. So that helps to relate to a reference to about a differential of $4 per day, as we are now in the skilled unit, and the difference between our costs with a nursing increment and the $50 rate --

THE COURT: You said 15,000 or five?

THE WITNESS: Fifteen thousand.

THE COURT: Wait a minute. How did you figure the $15,000 for January?

THE WITNESS: That question related only to the skilled unit, and the skilled unit has 5,323 patient days times approximately $3 per day, came to $15,000.

THE COURT: What is the number of patient days per month for skilled?

THE WITNESS: 5,323.

THE COURT: We will adjourn in just a minute, but I want to get this. Didn't you have this same 5,000-odd patient days per month for skilled in November and December?

THE WITNESS: Yes.

THE COURT: Let us suppose I take 5,000 patient days skilled per month in November.

THE WITNESS: Yes.

THE COURT: Let us just say November.

THE WITNESS: Yes.

THE COURT: I want to see the difference between what you would get at a $48 rate and a $53 rate. Wouldn't I multiply 5,000 by 6?

THE WITNESS: Yes.

THE COURT: And I would get $30,000; right?

THE WITNESS: Yes. Per month in the skilled.

THE COURT: Right. That is why I questioned your giving me $150,000 per month difference. It could not be that.

THE WITNESS: I believe when I answered that question I was dealing also with the ICF and I was contrasting -- I forget exactly what the context of that question was.

THE COURT: The context was that ICF was increased from $36 to $36.72.

THE WITNESS: But when you asked me the question on November-December, my mathematics were approximately a $10 a day difference. I was relating there to the 27 versus 36.

THE COURT: No, I did not ask you that. I did not ask you that. The $27 rate, and I know we have a lot of figures, but I started with the assumption that the rates for November and December would be $48.13 and $36.72. I asked you how much more would be yielded if you went back to the pre-November 1 rates of $53 and $36. That difference is not going to be any $150,000 a month.

THE WITNESS: No.

THE COURT: It is going to be about $30,000 a month.

THE WITNESS: Correct.

THE COURT: At least we know what we are talking about.

See you at 2:15.

(Luncheon recess)

AFTERNOON SESSION

(There was a conference in the robing room off the record.)

N O R M A N E. H A R P E R, resumed.

THE COURT: We had a discussion off the record, and Mr. Davidoff, I think, stated in quite a clear form what the purpose of the Department of Health was in dealing with the Loretto Home and perhaps other homes. I think it would help to clarify the issues if you just confirmed that on the record, Mr. Davidoff. Would you do that?

MR. DAVIDOFF: Yes, sir. A work plan was developed for all those facilities identified among the plaintiffs.

THE COURT: You mean as having a serious financial problem?

MR. DAVIDOFF: As having a serious financial problem. We were of the impression that that was something like a total of thirty or forty homes. The first group given us by the Association and their attorneys consisted of thirteen facilities.

The plan we used on the thirteen, including Loretto, was to identify on an annual basis the deficit that occurred on the basis of the November 1 rates forward and annualized, taking that income as against their reported expenses. The reported expenses that we used uniformly were the first ten months of 1976, because that is what was available.

We then identified a deficit as just described. Our staff was requested to do a management-type review of each of the facilities to determine what cuts in operational expenses could be incurred without affecting the rating that the facility received and without, of course, affecting the proper quality of patient care.

.We were also then to review any existing appeals or to even find grounds for proper appeals, if necessary and if such an appeal was advanced. Our goal in each case was to hopefully between staff-recommended cuts and bona fide appeals which we could sustain and show to the Division of the Budget and which the Division of the Budget after proper justification could approve, that the totality of those cuts and approved appeals would add up at least to the deficit, thus showing that there was not the original irreparable injury as claimed.

We performed that exercise as stated in Dr. Cicero's letter to you of January 6 for thirteen facilities, among which was Loretto.

Based on the information we had, we were of the opinion that there was an annualized deficit of approximately

$793,000; that the accepted recommended cuts, as implemented by the facility, were in the neighborhood of $291,000; and that the residual effect of the specific appeal, which has not yet been resolved with the Division of the Budget, will add 518,000 and some dollars, which, when added together, exceed the deficit.

We performed that kind of exercise for all thirteen of the original prioritized facilities, and we are in the process of doing the same thing last week and this week for the second group. We have used the same approach in each and every facility, and in all, cases save three or four, between program recommended cuts, not necessarily agreed to yet by the facilities, but between program recommended cuts and apparently approvable and appealable items, the deficit or the target we were aiming at has been exceeded.

THE COURT: Mr. Davidoff, as I understand it from your discussion off the record, the recommended cuts with respect to Loretto were agreed upon by Loretto; right?

MR. DAVIDOFF: Yes, sir.

THE COURT: In other words, you told me that in the view of the Department of Health Loretto was fully cooperative; right?

MR. DAVIDOFF: Yes, sir.

THE COURT: Let us just run through the rates. We have had these figures so many times, but I want to tie them in to your statement.

Prior to November 1, the rates for Loretto were $53 and $36.

MR. DAVIDOFF: Correct, sir.

THE COURT: When I use two figures, I am always going to refer to this pair of figures relating to skilled nursing and intermediate, and I won't keep repeating that. But prior to November 1 the rates were $53 and $36; is that right?

MR. DAVIDOFF: Yes, sir.

THE COURT: The published rate as of November 1 was $42.30 and $27.14; right?

MR. DAVIDOFF: Yes, sir.

THE COURT: There was a first stage appeal, which resulted in an increase from the $42.30 and $27.14 to $48.13 and $31.94 -- or $31.54, respectively. Correct?

MR. DAVIDOFF: Correct.

THE COURT: Although there was an administrative foul-up, I understand it to be the fact that the $48.13 and $31.54 are definitely unquestionably approved rates for Loretto for November and December.

MR. DAVIDOFF: Correct.

THE COURT: Just to have the narrative complete, was there a recommended increase as of January 1 that was not the result of an appeal but was a sort of a standard increase?

MR. DAVIDOFF: Yes, sir, there was.

THE COURT: What were those figures?

MR. DAVIDOFF: Again, in the same order you have been doing it, $50.10, $32.73.

THE COURT: As I understand it, the $50.10 rate is approved to go into effect January 1; is that right?

MR. DAVIDOFF: Yes, it is.

THE COURT: And there is no proposal on the part of the Department of Health at the present time to increase that? Is that correct?

MR. DAVIDOFF: That is correct.

THE COURT: But as the result of another appeal, or a second stage of appeals -- let me start again.

There was a second stage of appeal which, as I understand it, protested both the $50.10 rate and the $32.73 rate as well as the approved rates for November and December; right?

MR. DAVIDOFF: Yes, sir, that's correct.

THE COURT: The recommendation of the Department of Health with respect to that second stage of appeal is as follows, as I understand it: No changes are recommended with respect to the skilled rates of $48.13 and $50.10.

MR. DAVIDOFF: That is correct.

THE COURT: But there is a recommendation for changes in the intermediate rates. As I understand it, it is recommended that the intermediate rate be increased from $31.54 to $36.72 for November and December; right?

MR. DAVIDOFF: Correct.

THE COURT: It is recommended that the intermediate rate beginning January 1 be increased from $32.73 to $36.91; right?

THE WITNESS: That is correct.

THE COURT: Do I understand that it is the objective and intention and belief of the Department of Health that if these final recommended rates are put into effect by the Bureau of Budget, and on the assumption that the agreed-upon cuts have been carried out, it is your belief and objective that Loretto will run on at least a break-even basis for the period November and December, and commencing January 1?

MR. DAVIDOFF: Yes, sir, that is our position.

THE COURT: I think what we discussed in the robing room is the fact that in response to questions of mine, there are indications that the people from Loretto do not feel that they will be running on a break-even basis with those rates, either for November and December or beginning January 1. You recall that?

MR. DAVIDOFF: Yes, I do, sir.

THE COURT: It is your belief, when we say break-even basis, that all obligations accruing in those months are met, and including mortgage payments, deposits in escrow funds, etc.; right?

MR. DAVIDOFF: Yes, sir.

THE COURT: It seems to me that in view of these circumstances it is mandatory that you and your staff get together immediately with the Loretto staff and find out what differences there are if any; in other words, are there really differences or is it somebody just has not calculated right? Or even if they have not calculated right, that is a difference, but what I am saying is that I think you have to find out where it is that there is the discrepancy between your belief and the belief of the people at Loretto. Is it that somebody has made a mathematical error? Or is it that some of your assumptions were incorrect, that is, that the use of pre-October 31 costs does not turn out to be realistic, or is it that there are some phase-out costs in discharging people that you have not taken into account? I don't know, but it seems to me, in view of the fact that your objectives are as stated, one cannot exactly quarrel with that and you had better find out why it is that there are any differences.

MR. DAVIDOFF: We agree.

THE COURT: So I am going to expect two things: I am going to expect that we will get a report. Well, I think the first thing is to work together on these figures, and of course the second thing is to find out the view of the Bureau of the Budget.

If for any reason it is going to end up that the Department of Health is going to recommend some further adjustment, then that will have to be considered by the Bureau of the Budget. But all of these things can work together pretty quickly.

MR. DAVIDOFF: Right.

MR. MISHKIN: Your Honor, I think before we embark upon that process there are one or two questions that I would like to put to Mr. Harper so we understand exactly where we are right now.

THE COURT: Fine.

BY MR. MISHKIN:

Q Mr. Harper, will you tell the Court what you have in the bank right now to meet your current expenses?

A $1400.

Q Tell us when your next payroll date is.

A The 17th of February.

Q Will you be able to meet that payroll, assuming the $50 rate?

A Assuming the $50 rate and assuming that the County of Onondaga does not claim the November overpayment of $95,000, we will have enough money just to meet that payroll, without meeting the withholding tax obligation.

THE COURT: Another thing I said in the robing room: This lawsuit is a small part of the overall, really grave difficulties in the financing. The problems with the Loretto Home involving hundreds of thousands of dollars accrued long before this lawsuit was started. The aged arrearages of accounts payable, the failure over a period of many months to make any deposit in the escrow funds, and so forth--the relief sought in this action is a drop in the bucket compared with that problem which affects patients, which affects nursing home operators, which affects the Department of Health, which affects the bondholders. All of that has been revealed in vivid detail this morning.

So to find out that there is $1400 in cash in the bank would almost be expected. I think they are lucky to have $1400, considering the way things have gone.

MR. MISHKIN: That just goes to the immediacy. But I think, as we have tried to make clear, your Honor, there was a lawsuit on a state level which challenges the states, and indeed the State Supreme Court held those rates illegal.

THE COURT: That is another rather confusing situation: to have two lawsuits split up in different courts. It would be vastly better to have somebody handle the whole thing. This is an overall big problem. It is not a problem that can be handled sensibly piecemeal.

MR. MISHKIN: But the federal standards did not come into being until after that first lawsuit and prior to the commencement of this lawsuit.

THE COURT: All right. We won't argue about that.

MR. MISHKIN: Your Honor, I am still unclear as to the state's position. Because even if they are correct -- and I think Mr. Harper and Loretto dispute that -- but even if they are correct that $50 is somehow sufficient prospectively, the state has threatened to foreclose on previous obligations. That is a matter that affects patients right now, because if Loretto is foreclosed, even if the state is right, we are going to have a problem.

THE COURT: I am glad you brought it up. You are inviting a foreclosure, is that right?

MR. MISHKIN: I am not inviting it, your Honor. I am just inviting you to Plaintiffs' Exhibit 17, which says there will be a foreclosure.

MR. DAVIDOFF: Your Honor, in that regard we have not brought this up before, but it is very pertinent. There isn't going to be any foreclosure, because the state has statutory remedies built into that Article 28-A process that envisioned just such cases. There is procedure in 2862 of the Public Health Law, the New York State Public Health Law, which permits the Commissioner of Health to go into the New York State Supreme Court and seek all sorts of relief.

THE COURT: It seems to me inevitable, and what is vividly apparent, that the concept the state may have had about the financial operation of the Loretto Home was sharply different than the path pursued by Loretto. There just was not a meeting of the minds. There was not a coordination of two concepts. That led over a period of months to a failure to make the escrow fund deposit. It led to, at least beginning on October 27, a failure to make mortgage payments. It led to the astoundingly large growth of aged unpaid accounts payable.

This is a big problem, and it probably is not limited to Loretto.

MR. MISHKIN: If I might just --

THE COURT: This is beyond my bailiwick, but I am just as sure as I am sitting here that the state will not run and foreclose. The state has other problems, and it seems to me the state has to pursue what it really started to pursue, as Mr. Davidoff said, that is, how to get the objectives of the bondholders and the Department of Health and the nursing homes coordinated so that everybody is honoring the obligations. That is really not going to be done by a foreclosure; it is going to be done by pursuing further exactly what Mr. Davidoff said, which is getting them running on a break-even basis. They have to run on a break-even basis or else there will be defaults that have very serious consequences.

What Mr. Davidoff said is an objective. Obviously there is many an opportunity for a slip there. But at least it is an objective. It has got to be the objective. It has just got to be.

What happens as to the period before November 1 is really out of the range of this lawsuit, and so I just can't get into that.

MR. MISHKIN: Your Honor, let me first say about this point of the nursing homes and the Department of Health going off in different directions prior to November 1: That really is not true, because the staffing patterns that all of these homes have, have been approved consistently by the Department of Health. Indeed, your Honor, as we have in the record -- I am not going to belabor this --

THE COURT: What I meant was, what do you think is represented by the fact they did not make any escrow fund deposits? How is that going to handle the rating of the bonds and the ability to sell more bonds or do whatever is necessary? That is what I am talking about. Financially they were on a sharply divergent course from that which was conceived of. Let us go to the next home.

Thank you, Mr. Harper. You may step down.

(Witness excused)

MR. MISHKIN: Mary Manning Walsh. Your Honor, Mary Manning Walsh is represented by Mr. James Hallisey, of the firm of Kelly & Hallisey.

MOTHER ALOYSIUS McBRIDE, being first duly sworn, testified as follows:

MR. HALLISEY: Your Honor, I would like to hand up an affidavit of Mother Aloysius McBride, and offer it as Plaintiffs' Exhibit 18. I have given a copy of that affidavit, your Honor, to defendants' counsel this morning.

I might say, your Honor, if the Court will just take a few moments to look over that short affidavit, it will present a much different picture than the Loretto situation and, I think, save a lot of time.

THE COURT: Let us go into the basic facts. Did anybody from the Mary Manning Walsh Home testify before?

MR. HALLISEY: Not to my knowledge, your Honor.

MR. STERN: No, your Honor.

THE COURT: Do we have the statistics about the rates?

MR. HALLISEY: Your Honor, I have those on page 3 of the affidavit.

THE COURT: I will mark the exhibit as 18 in evidence.

xxx (Plaintiffs' Exhibit 18 received in evidence.)

THE COURT: Where is the rate schedule?

MR. HALLISEY: Your Honor, on page 3 of the affidavit there is a rate schedule.

THE COURT: Can we use the same terminology, skilled nursing and intermediate?

MR. HALLISEY: No. In this case, your Honor, HRF is the nursing --intermediate is in between an HRF and --

THE COURT: What is the word we can use?

MR. HALLISEY: HRF.

MR. STERN: It is the same as ICF.

THE COURT: Can we call it intermediate?

MR. STERN: Yes.

MR. HALLISEY: Yes. We don't do it that way, but for this purpose we will do it. It will clarify it. But if I slip every once in a while, your Honor, you will know why.

THE COURT: Yes. What is your name?

MR. HALLISEY: Mr. Hallisey, your Honor.

THE COURT: I am going over the figures in the affidavit. With respect to the figures, I think I will just drop the cents, so we can just speak in dollars and save time. The rate prior to November 1, 1976, was $62 and $41?

MR. HALLISEY: Yes, your Honor.

THE COURT: Then effective November 1 the rates were $53 and $37.

MR. HALLISEY: That is correct.

THE COURT: In each case there was something over and above that, a few cents, but anyway I will drop that.

You have a notation: Effective November 30, 1976, $65 and $36. What was that?

MR. HALLISEY: That is the very issue, your Honor, of what I am here for, and that is that the Department of Health, through Dr. Cicero's letter to you of January 6, your Honor, on page 2 of that letter, stated that the Department of Health had granted relief to the Mary Manning Walsh Home by recertifying their certificates, which of course would change their rates to those stated in Dr. Cicero's letter to you, your Honor. Thereafter the Department of Health sent through all the documentation which is attached to our affidavit, your Honor, and just recently, within the last few days, Mary Manning Walsh received their certificate, which by law must be put on public display at the home.

Everything is wonderful except one thing, your Honor. Division of the Budget told the Department of Health not to give us our new rates.

THE COURT: I just cannot get into all this. This is rhetoric. I want to get back to something. You are relying on Dr. Cicero's letter which we have already seen; right?

MR. HALLISEY: Plus the other letters in the affidavit, your Honor.

THE COURT: The Cicero letter of January 6 mentioned a rate of $65 and $36. Were there other letters which confirmed those rates?

MR. HALLISEY: The other letters, your Honor, that are attached to the affidavit do not speak of dollars, but they confirm that the home has been recertified to those rates.

THE COURT: Where are those letters?

MR. HALLISEY: That is Exhibit B, your Honor.

THE COURT: All right, let us look at Exhibit B. That is a letter of January 11 from the Department of Health to Mother McBride, and you understood that to be the confirmation of the new certificate referred to in Dr. Cicero's letter.

MR. HALLISEY: That is absolutely correct, your Honor. It is an absolute follow-through on Dr. Cicero's letter to you.

THE COURT: What is the next step?

MR. HALLISEY: The next is that we received then, your Honor, by mail dated -- well, it was January 27, we received the certificates as mentioned in Exhibit B.

THE COURT: Where are they?

MR. HALLISEY: They are Exhibits C and D.

THE COURT: What is the next step?

MR. HALLISEY: The next step, your Honor, the Department of Health disregards all of that correspondence --

THE COURT: Let us leave that aside. Did they give you notice of something?

MR. HALLISEY: No, they gave us nothing. We got the January 1 rates in the mail.

THE COURT: Who knows about this from the Department of Health? Dr. Haughie or Mr. Davidoff?

MR. HAUGHIE: Your Honor, excuse me, what is this?

THE COURT: Mary Manning Walsh Home. Did you hear Mr. Hallisey? Did you hear Mr. Hallisey?

MR. HAUGHIE: Your Honor, I was trying to correlate his conversation with the single copy of the affidavit to identify the exhibit.

THE COURT: What he said is very simple. He starts with the Cicero letter of January 6. You are familiar with that?

MR. HAUGHIE: Yes, we have a copy of that.

THE COURT: And it says that the Walsh 1976 rate will be increased on the basis of a new bed certification from $53 in the nursing home to $65, and slightly decreased in the health-related facility from $37 to $36 -- again I am leaving off the change and dealing solely in the dollars.

Have you got Mother McBride's affidavit?

MR. HALLISEY: Yes, he does, your Honor.

MR. HAUGHIE: Yes.

THE COURT: There is an Exhibit B, January 11, Mother McBride was advised of a new bed certification, which Mr. Hallisey says was exactly what was referred to in the January 6 letter. It would provide for 301 nursing home beds and 61 HRF or intermediate beds. Right?

MR. HALLISEY: That is correct, your Honor.

THE COURT: Now he says that according to Exhibits C and D, those formal certifications were received. So he says there is an exact correlation, an exact follow-up between what was predicted in Dr. Cicero's January 6 letter as far as the new bed certification.

He says he hasn't gotten any formal notice that the Mary Manning Walsh Home is not going to get $65, but he is not exactly sure it is.

MR. HAUGHIE: All right, your Honor. Perhaps I can reconstruct it in this fashion. In the January 6 letter the point was made very clearly today that Dr. Cicero was trying to indicate the progress that the state was making to try to be responsive to the needs of the home and the needs of the court. As a preliminary --

THE COURT: I don't want to have that repeated. I want to know specifically what happened. Dr. Cicero refers to a new bed certification, and it seems that from the documents that that was carried out.

MR. HAUGHIE: Yes. Your Honor, in the January 11 letter to Mother McBride, in the second paragraph the note is made that this is a temporary measure based upon the current needs for skilled nursing beds in the facility. There is a provision within the hospital regulations which allows the regional health officer to temporarily recertify beds for a limited period of time.

THE COURT: It may be temporary. Has it been revoked?

MR. HAUGHIE: No. The temporary certification has not been revoked.

THE COURT: All right. So it is in effect.

MR. HAUGHIE: The next step that occurred, your Honor, was to recommend to the Department of Budget that the reclassification be considered in the groupings for determination of the rate which was alluded to in Dr. Cicero's January 6 letter.

THE COURT: What recommendation did the Department of Health make?

MR. HAUGHIE: The Department of Health made a recommendation that there be a change in grouping.

THE COURT: Did the Department of Health make a recommendation as to a rate or a recommendation which would yield a particular rate? What did it recommend about the rate?

MR. HAUGHIE: I don't have the transmittal from Commissioner Whalen to the Director of the Budget in which this particular rate is cited.

THE COURT: Was there a transmittal?

MR. ROLLO: Yes, there was a transmittal.

THE COURT: And Commissioner Whalen is the Commissioner of Health?

MR. ROLLO: Yes.

THE COURT: What did he recommend?

MR.HAUGHIE: I assume, your Honor, that it is the two numbers cited on page 3 of the affidavit, the third line from the bottom.

THE COURT: What are those numbers?

MR. HAUGHIE: The 65.55 for the skilled facility, and the 36.36 for the ICF.

THE COURT: We should not be dealing with assumptions. We came together here to review all the facts about several homes and including the Mary Manning Walsh Home. I should know categorically what recommendation the Department of Health made. What did it make? Doesn't anybody know?

MR. DAVIDOFF: Your Honor, I can state categorically of my own personal knowledge that the numbers just quoted were the recommended rates to the Division of the Budget.

THE COURT: When were they so recommended?

MR. DAVIDOFF: It would have had to have occurred simultaneously with the dating of these certificate changes.

THE COURT: That would be --

MR. DAVIDOFF: It was certainly before the 27th of January, your Honor, and after the 1st of January. In the first week or so.

THE COURT: Has the Bureau of the Budget acted?

MR. ROLLO: Yes, it has.

THE COURT: What is its action?

MR. ROLLO: It disapproved it.

THE COURT: Did it notify anybody? Did it write a letter?

MR. ROLLO: The Division of the Budget wrote a letter to the Department of Health disapproving the appeal.

THE COURT: Where is that letter?

MR. ROLLO: I have a copy of it here.

THE COURT: Has a copy gone to --

MR. HALLISEY: No, your Honor.

MR. ROLLO: I believe the Department of Health has a copy.

THE COURT: Did the Department of Health ever furnish any notification to the Walsh Home?

MR. DAVIDOFF: The Department of Health, your Honor, in view of the fact it was in the confines of this lawsuit, furnished copy by Telex to the attorneys for the class and to the director of the Association.

THE COURT: Let us have the Bureau of the Budget letter, please.

(Handed to the Court by Mr. Rollo)

THE COURT: Let us mark this the next plaintiffs' exhibit, which would be what?

MR. HALLISEY: Plaintiffs' Exhibit 19.

(Plaintiffs' Exhibit 19 marked for identification.) xxx

THE COURT: I think you had better read this.

MR. HALLISEY: Your Honor, I have read it already.

THE COURT: You have?

MR. HALLISEY: Yes.

THE COURT: All right.

MR. HALLISEY: I would just like to comment on it, your Honor. We find ourselves in a very strange position. The Department of Health, your Honor, has the sole power to certify and recertify a facility. The Department of Health sent in there their staff, and after being there for several days the Department of Health recertified Mary Manning Walsh in accordance with their power.

They gave us the certificates. The certificates are on public display, as the statute provides, and the Division of the Budget, who has no authority, then tells the Department of Health: "Don't issue them the new rates. Even though you recertify them, don't issue them the new rates."

The Department of Health is in the middle and they don't know which way to go, so the best way to go is not to give us the new rates. That is what is causing the hardship.

I say that the budget cannot hold up the new rates, your Honor, once the Department of Health has recertified them. And they have done that.

THE COURT: If the new rates were in effect, would that be --

MR. HALLISEY: That is our relief, your Honor, yes. That would be our relief.

THE COURT: All right. So this is not a violation of the federal statute. Your claim now is that the Bureau of Budget has no power under state law to hold up --

MR.HALLISEY: No, I am saying that is the result of it, your Honor, but by issuing us the January 1 rates, which is an annual decrease of about $1,400,000, just like --

THE COURT: Let us stick to the issues.

MR. HALLISEY: Yes.

THE COURT: The Department of Health has issued you certificates which you contend place your client in the category where it is legally entitled to the rate you are seeking; right?

MR. HALLISEY: Yes, your Honor.

THE COURT: And you claim that under state law the Bureau of the Budget has no power to void those certificates and that your home now is in a category of over 300 skilled nursing beds and is legally entitled to a particular rate; correct?

MR. HALLISEY: That is correct, your Honor.

THE COURT: Under state law?

MR. HALLISEY: That is one part of the issue. The answer is yes. But the other issue --

THE COURT: You have no longer any claim that the Department of Health is selling you short by either putting you in a wrong classification or calculating your rates wrong. The Department of Health's calculations are all fine; right?

MR. HALLISEY: I would imagine they are correct, your Honor.

THE COURT: Yes.

MR. HALLISEY: But what I don't know is whether or not there is a conspiracy between the Department of Health and the Division of the Budget, where one is the nice guy and then one is the bad guy, and so they are playing one off on the other, and so nothing gets --

THE COURT: Wait. You can take discovery about whether there is that kind of a conspiracy, but you have not proven it to me. If you want to take their depositions and find out whether there is a conspiracy, why, go to it. But I think that ends the claim of your client in this court, because you have no claim for violation of a federal statute. You have strictly a state law claim where you say that the Department of Budget -- I would get a writ of mandamus against the Department of the Budget.

MR. HALLISEY: No, your Honor, I am claiming as part of the class action that the January 1 rates and the November 30, 1976 rates were issued in violation of the federal statutes, as given to you by Mr. Davidoff the other day, wherein those class action --

THE COURT: The type of claim you are discussing with me is completely different. The issues are completely different from --

MR. HALLISEY: But don't you see?

THE COURT: Just let me finish. And if you don't understand what I am saying, I don't understand you.

The issues which we are discussing at the present moment and have been discussing for the last few moments are completely different from the issues which we discussed all morning and a lot of the afternoon relating to Loretto. You have got your particular problem. It is a different kind of problem. The solution to that problem does not involve going through the kind of exercises that we went through with Loretto -- I hope it does not --

MR. HALLISEY: I don't think it does, your Honor.

THE COURT: No, it does not. The issues are different. How do we resolve these issues?

MR. HALLISEY: Let me just say this, your Honor: If the Department of Health is allowed to issue these letters and lead us to believe and lead your Honor to believe that we are a 300-bed institution, to get us out of this lawsuit, well, that is really not the way it should be done.

THE COURT: This is just rhetoric.

MR. STERN: Excuse me, your Honor, may I speak for a moment on this?

THE COURT: Yes.

MR. STERN: Your Honor, this letter to your Honor reflecting the 301-bed certification arose in the --

THE COURT: It wasn't a letter to me.

MR. STERN: Well, it first found its way into print in Dr. Cicero's letter to you, your Honor, and therefore it arose in virtually the same manner as Loretto. Because Mary Manning Walsh was a home in dire financial straits as a result of a $53 rate, which we assert was illegal under federal law. As part of that undertaking to you, an undertaking by Dr. Cicero to make you review a --

THE COURT: Let us cut this off. This is not helpful. I want to go to the state people. What is going to be done?

MR. HAUGHIE: Your Honor, in light of the response from the Division of Budget, the Department of Health is initiating today through our New York City regional office a patient-by-patient analysis of the appropriateness of level of care in Mary Manning Walsh facility.

The second point, however, that should be made is that a similar management assessment was, as described earlier by Mr. Davidoff, conducted of the Mary Manning Walsh institution, and the deficit that was identified again in a similar fashion, to examine the 1976 expenditures and the anticipated funds from Medicaid, given the new Medicaid rates, that deficit was of the order of $925,000. The

Department recommended possible cuts that should be made in the facility totaling $1,043,000.

It is our contention to that extent, then, that if the recommended cuts were implemented that the deficit would disappear.

THE COURT: I cannot conceive of a more confused way of handling this. I just cannot even dream anything up. If the state was going to recommend cuts to the Walsh Home in the way that it did with the Loretto Home, and if it was going to proceed in the same way that we had described at great length with the Loretto Home, certainly that is one way to proceed. Whether it ends up the right place, I don't know, but it is a way to proceed.

If, on the other hand, the Department of Health is going to take steps to do something different and on a different course, that is a different thing.

From the documents, and maybe there is more background that can be furnished, but the documents indicate to me that the Department of Health did not proceed the way they did in the Loretto Home. Did they?

MR. DAVIDOFF: Sir, respectfully, it is completely consistent with what we did in Loretto.

THE COURT: Why?

MR. DAVIDOFF: Because, your Honor, we said that what we were endeavoring to do in each of the thirteen cases is identify the deficit, make recommended cuts, and handle any appeals that we either received from the facility or which we perceived to be methods of handling it.

We have some cases where the recommended cuts exceed the deficit but where there is also a potential bona fide appeal as well. We viewed it to be our specific responsibility to make recommended cuts. But if there was also a bona fide appeal which we could pursue and attempt to convey properly to the Division of the Budget, we were to do that as well.

THE COURT: I think the best way to proceed is: You present your analysis, just go through in the same way for the Walsh Home that you did for the Loretto Home. Do you have that material?

MR. DAVIDOFF: Yes, sir.

THE COURT: What are the figures and what was your analysis?

MR. MANTZOROS: May we mark this Defendants' Exhibit EE, your Honor? Because he is reading from notes.

THE COURT: All right, may I have Exhibit EE? Let us get it marked.

xxx (Defendants' Exhibit EE marked for identification.)

THE COURT: Do you have similar notes for Loretto?

MR. MANTZOROS: Yes, your Honor.

THE COURT: Let us get those marked too as FF for identification.

MR. DAVIDOFF: These are for identification, your Honor?

THE COURT: Yes.

(Defendants' Exhibit FF marked for identification.) xxx

THE COURT: Now let us go along with the analysis of the Walsh Home.

MR. DAVIDOFF: As we did in the case of Loretto, we identified the deficit, based on a 1976 ten-month budget and so forth. Our figures show --

THE COURT: In the same way you described for Loretto.

MR. DAVIDOFF: Yes, sir, in the same way.

THE COURT: All right. What deficit did you project?

MR. DAVIDOFF: We projected a deficit of $924,635.

THE COURT: Where is that shown?

MR. DAVIDOFF: That is shown on the top of page 1, the third figure.

THE COURT: Yes. The tag was over it. I am sorry.

MR. DAVIDOFF: You see that those three lines, your Honor, are at the heart of how we got the deficit, as we described it in the Loretto case.

THE COURT: I see.

MR. DAVIDOFF: What you see on that page are five major areas where we identified cuts totaling $1,043,200.

The facility, in its responses, was unable --

THE COURT: Was this given to the facility?

MR. DAVIDOFF: It was, yes, sir.

MR.HALLISEY: May I know when. your Honor? Because it wasn't.

THE COURT: All right, Mr. Davidoff, when was it?

MR. DAVIDOFF: On two occasions, if I am not mistaken.

THE COURT: Who was it given to?

MR. DAVIDOFF: Certainly on the 19th of January.

THE COURT: To whom? In what form?

MR. DAVIDOFF: The facility, after our staff met for two days, on the third day each facility was invited to come to Albany, including Mary Manning Walsh, to review our findings. At that time and place, of my personal knowledge, I know Mother was there and so was Mr. Hallisey as well as some other staff of theirs, and we reviewed this document with them.

MR. HALLISEY: That is not true, your Honor. Mr. Davidoff wasn't in the room, except for a few moments. That document was never reviewed with us.

THE COURT: Was any record made?

MR. DAVIDOFF: Certainly a record was made and certainly the numbers on this document were discussed that day.

MR. HALLISEY: They were not, your Honor. I am telling you they were not.

THE COURT: Well, it is an issue of fact. Let us go ahead with your version.

MR. HALLISEY: That is the first time I am hearing these numbers now.

MR. DAVIDOFF: I am sorry, in all good faith I just cannot believe or understand that response.

THE COURT: Let us go ahead with that version.

MR. HALLISEY: Mr. Davidoff wasn't there, your Honor.

THE COURT: Please, one at a time.

MR. HALLISEY: Surely.

MR. DAVIDOFF: I believe that we communicated to the facility that there were cost savings available as described on that page which total up to $1,043,200.

We have reported on the pages thereunder statements made by Mother Aloysius -- and see the names "Mr. Hallisey and Mr. Burke" --

THE COURT: Where?

MR. DAVIDOFF: On the second page. The right-hand column.

THE COURT: Mother Aloysius, did you ever see that before, that Exhibit EE?

THE WITNESS: No, not in this form, your Honor.

THE COURT: Did you see it in any form?

THE WITNESS: Figures were presented to us at the hearing in Albany, but we did not see this form.

THE COURT: But I am not concerned about the form. Would you look at the figures on the first page. Were figures of that nature presented to you and discussed with you?

THE WITNESS: Figures were presented. I don't recall the exact figures.

THE COURT: But they were suggestions of cuts?

THE WITNESS: Figures in cuts were suggested.

THE COURT: Can you look at the second page where it says, over on the left. Did you respond or your representative respond in substance along that line?

THE WITNESS: We responded then. We responded in detail in writing --

THE COURT: What did you respond?

THE WITNESS: -- to Dr. Cicero, a copy of which was sent to you, your Honor.

THE COURT: What did you respond then?

THE WITNESS: That we would take all these matters under consideration.

THE COURT: All right. And this was at a meeting in Albany?

THE WITNESS: A meeting of our staff with staff of the Department of Health.

THE COURT: Then did you later respond in detail?

THE WITNESS: Yes, we did.

THE COURT: Did your home respond?

THE WITNESS: We responded to Dr. Cicero, a copy of which was sent to your Honor.

THE COURT: Where is that document?

MR. HALLISEY: I have a copy here, your Honor.

MR. MISHKIN: Yes, it also appears in the Waife affidavit.

THE COURT: Which is it?

MR. MISHKIN: I think it is G. Excuse me, it is Exhibit F.

THE COURT: Exhibit F. Why don't you go ahead, Mr. Davidoff, and give your version of the chronology.

MR. DAVIDOFF: Now, I certainly, after having seen Mother's letter, reaffirm that it was the 19th also, your Honor.

THE COURT: The conference.

MR. DAVIDOFF: Yes.

THE COURT: That is shown in Exhibit EE.

MR. DAVIDOFF: Yes, sir.

THE COURT: It is also shown in this Exhibit F to the Waife affidavit. Go ahead.

MR. DAVIDOFF: As was the case with all the other facilities, if there were a bona fide appeal -- first of all, your Honor, we would have hoped to have had a more productive response from the facility about the cuts they could make. However, the letter speaks for itself.

THE COURT: You are talking about Exhibit F, the letter of January 21.

MR. DAVIDOFF: Yes, sir.

THE COURT: What did you do? I want to find out what was done within the state authorities, please.

MR. DAVIDOFF: Upon receipt of the letter or just the --

THE COURT: Any time. The whole story.

MR. DAVIDOFF: We firmly stand by our recommendation, regardless of any appeal, that the $1,043,200 cuts can be made.

THE COURT: But what did you do?

MR. DAVIDOFF: In addition to that recommendation, which has not changed, notwithstanding the letter of the 19th, we have pursued the bed certification process, which has been accurately described.

THE COURT: What did you do to pursue that?

MR. DAVIDOFF: We asked our regional office to verify by a method that indeed at least 301 patients needed the SNF level of care, the skilled level. And for the processes of temporary bed certification, all the documentation that has been referred to you has in fact occurred as described, and on the basis of that, but certainly not automatically, we attempted to frame an appeal to the Division of the Budget, which would warrant the use of the grouping that a 301-bed facility would have. That works to the benefit of Mary Manning Walsh Home.

THE COURT: Just state for the record what is the benefit about the grouping.

MR. DAVIDOFF: The 301 skilled nursing beds would place Walsh Home, for comparison purposes, with larger homes, whose cost centers and cost ceilings were higher. Therefore, there would be less penalty to the home.

THE COURT: What is the cut-off, the number 300?

MR. DAVIDOFF: 300, yes. When this went to Division of the Budget, the response is as you see it.

THE COURT: I want to know more about what went on with the Department of Health, because it does not quite make sense to me. You told me that what you did in the case of Loretto was to do two things: You recommended some cuts and then you recommended rates to make up deficits after the cuts are taken into account.

MR. DAVIDOFF: Right.

THE COURT: And you went through an analysis of some figures --

MR. DAVIDOFF: Yes, we did.

THE COURT: -- that involved quantifying the cuts, seeing what remaining deficit existed, and you analyzed how your recommended rates took care of that remaining deficit.

MR. DAVIDOFF: Correct.

THE COURT: Did you do the same thing or do you have the same analysis in the case of the Walsh Home?

MR. DAVIDOFF: We do. However --

THE COURT: What is that analysis?

MR. DAVIDOFF: The difference, sir, is that in the case of Walsh Home the recommended cuts on their face exceed the deficit, whereas in the case of Loretto they did not. The process is the same.

THE COURT: It is not the same process. The way I read it is this: You recommended some cuts which would have eliminated the deficit.

MR. DAVIDOFF: Yes, sir.

THE COURT: The Walsh Home disagreed. At some point -- and I don't know when it was, but maybe we can find out -- the Department of Health decided that instead of insisting on any cuts, you would --

MR. DAVIDOFF: That is not correct, sir.

THE COURT: Then you correct me.

MR. DAVIDOFF: All right. They were simultaneous actions.

MR. HALLISEY: Your Honor, they --

THE COURT: Just a minute. What do you mean? What I am trying to get in terms of dollars: If the Walsh Home had made those cuts, there would not have needed to be any adjustment of rates at all or any recertification; is that right?

MR. DAVIDOFF: That is correct.

THE COURT: None.

MR. DAVIDOFF: That is correct.

THE COURT: So it was not like Loretto where you had a certain amount covered by cuts and a certain amount covered by the increased rates.

MR. DAVIDOFF: In that sense, you are correct.

THE COURT: Yes, it is a big sense to me.

In the case of the Walsh Home, when was it that you made a decision to grant them a new type of certificate?

MR. HALLISEY: Your Honor, it had to be before January 6, which was the letter to you. It had to be before January 6.

THE COURT: Yes.

MR. DAVIDOFF: That is correct.

THE COURT: All right.

MR. HALLISEY: And we did not go to Albany until January 19.

THE COURT: Just a minute.

MR. DAVIDOFF: I repeat that as we began, in the context of this lawsuit, to develop a plan of action, we simultaneously reviewed each of the thirteen facilities involved in the first grouping of priorities, to determine what appeals were possible and to determine what cuts were possible.

THE COURT: I am getting a different picture. I thought that it was not a matter of your sort of deciding what appeals might be possibly appealing to the Bureau of Budget. I thought that you, the Department of Health, exercised your judgment as to what was the proper course.

MR. DAVIDOFF: That is correct.

THE COURT: What in your judgment was the proper course here, in the judgment of the Department of Health? Was it proper to have the cuts or was it proper to have the recertification and increased rates? What was the judgment of the Department of Health?

MR. DAVIDOFF: It was our judgment that, notwithstanding the $1,043,200 figure --

THE COURT: Possible cuts.

MR. DAVIDOFF: Possible cuts. -- that it would not be easy for the facility to do all that, although our staff recommendations were strongly that way. In view of the possibility of going to the 301 --

THE COURT: I am not talking about "in view of the possibility." That does not talk to me in language of a judgment of what is a right way to handle the finances in that home.

MR. DAVIDOFF: It is our judgment that the facility should be classified as a facility over 301 beds and make some of the management cuts.

THE COURT: Why was it the judgment of the Department of Health that the facility should be classified as a facility having over 300 skilled nursing beds? Why was it?

MR. DAVIDOFF: It was our program impression, decision, that there were enough patients in that facility that needed the skilled level of care to fill up 301 of those beds.

THE COURT: Did you get information upon which you based that belief?

MR. DAVIDOFF: Yes, sir, we did.

THE COURT: What was that information?

MR. DAVIDOFF: That was information from our regional office staff that they did a partial survey of the patients and were able to identify some that made them have the opinion it could go to 301.

THE COURT: Was this sufficient information to satisfy the Department of Health on that subject?

MR. DAVIDOFF: On the subject of the temporary certification, absolutely, and the director so states.

THE COURT: All right. But the temporary certification, as long as that would exist, they would deserve that higher rate; right?

MR. DAVIDOFF: No. I am sorry, sir, that does not necessarily follow.

THE COURT: But they would become during that time a facility of over 300 beds, would they not?

MR. DAVIDOFF: Yes, they would.

THE COURT: And whatever classification would follow, would follow. Right?

MR. DAVIDOFF: No, sir, not necessarily.

THE COURT: I thought that there would be a different ceiling for a nursing home with over 300 skilled beds.

MR. DAVIDOFF: However, all year long, in all sorts of facilities, there are changes, based on emergencies or situations of the moment, and temporary documents of this sort are issued. Procedurally, the Department has not gone about the business of changing all of those in midstream. It was our judgment that in view of the demonstrated hardships at this facility that it would be appropriate in this case, although unusual, to move forward in midstream with changing the grouping.

THE COURT: I am not interested in this. I am interested solely as far as it affects the rate.

MR. DAVIDOFF: Right.

THE COURT: Inevitably you considered that it would affect the rate; right?

MR. DAVIDOFF: Correct. We did.

THE COURT: And as reflected in Dr. Cicero's letter.

MR. DAVIDOFF: That is correct.

THE COURT: And that was your judgment as to what should be done; right?

MR. DAVIDOFF: Yes, sir.

THE COURT: Now I get back: You have information from your regional office which was satisfactory to the Department of Health in Albany; right?

MR. DAVIDOFF: Correct.

THE COURT: Where is that information?

MR. DAVIDOFF: That information is actually most accurately reflected as Exhibit B, which is the actual letter to Mother Aloysius from our New York City office.

THE COURT: Let us get that.

MR. DAVIDOFF: That is Exhibit B -- I must refer to the correct affidavit. This is Mother Aloysius' own affidavit.

THE COURT: All right. That does not contain any statistical material?

MR. DAVIDOFF: It does not, and never does, sir.

THE COURT: But I assume you had things in addition to what is written in Exhibit B?

MR. DAVIDOFF: The way the Health Department is structured and under its authority with the regional health directors, they have ample authority to issue these temporary certificates.

THE COURT: That is not my question. You told me you had information from your regional office.

MR. DAVIDOFF: That is correct.

THE COURT: And that was some sort of analysis. What was that?

MR. DAVIDOFF: That they conducted --

THE COURT: Did they give you something in writing?

MR. DAVIDOFF: They did not.

THE COURT: What did they do, telephone you?

MR. DAVIDOFF: They telephoned us, and under their previously granted authority, issued this letter, which is Exhibit B. They told us they conducted a partial survey of the patients and found from that partial survey that there were enough patients there needing skilled care that 301 --

THE COURT: And this was sent to Mother McBride on January 11; right?

MR. DAVIDOFF: Yes, sir.

THE COURT: I must tell you that if I had received Dr. Cicero's letter and the letter of January 11, I would figure that I would get, if all things continued, as far as the Department of Health was concerned I would have a recommendation that would produce a $65 rate.

MR. DAVIDOFF: That is a very valid assumption.

THE COURT: It would be a valid assumption.

Then the next thing that happened was, I guess, the January 19 meeting; right?

MR. DAVIDOFF: Yes.

THE COURT: And I think from what you told me before that you took the position that, although those custs were recommended and might be possible, that you recognized that they would be hard to achieve; is that right?

MR. DAVIDOFF: Yes, sir.

THE COURT: Did you communicate that position to the Walsh Home?

MR. DAVIDOFF: I must speak just for myself at the moment: I did not. And I suspect that no one did.

THE COURT: Did anybody come down with a ruling that they must make those cuts?

MR. DAVIDOFF: No, sir. At that time we presumed that our other course of action was going to solve some if not all of the problem.

THE COURT: Right. Then when was it that the Walsh Home was told that the Department of the Budget would not approve?

MR. HALLISEY: We were told today, your Honor.

THE COURT: I thought they said there was a Mailgram.

MR. HALLISEY: They mailed it to the class action, your Honor.

THE COURT: To the attorneys. When did you get notice?

MR. MISHKIN: It was telecopy, which is dated.

MR. DAVIDOFF: The Monday after the date of this letter.

MR. MISHKIN: I think we received it by telecopy January 31, 1977.

THE COURT: Can't we have that marked?

MR. MISHKIN: That has been marked, your Honor.

THE COURT: What exhibit is that?

MR. MISHKIN: I think that was marked as Plaintiffs' 19.

THE COURT: But that is the letter to Whalen.

MR. MISHKIN: That is correct. We received a telecopy of that.

THE COURT: Oh, you received a copy of that?

MR. MISHKIN: Yes, we did.

THE COURT: And you received it shortly after the 27th?

MR. MISHKIN: Yes. The 31st is the date we received it.

THE COURT: The 31st.

MR. MISHKIN: And we talked about this in court on the 4th.

THE COURT: Do you happen to have the telecopy?

MR. MISHKIN: Yes, we do.

THE COURT: I think it would help to have that marked.

MR. MISHKIN: All right.

THE COURT: Let us have that marked Exhibit 20 for identification.

xxx (Plaintiffs' Exhibit 20 marked for identification.)

THE COURT: Is it stipulated that this was sent to plaintiffs' attorneys and received by them about the 31st? Is that agreed?

MR. MANTZOROS: Agreed, your Honor.

THE COURT: Mr. Stern and Mr. Mishkin?

MR. MISHKIN: That is correct, your Honor. I would just note --

THE COURT: I will receive this in evidence.

MR. MISHKIN: -- for the record that the 31st of January was the date that we had originally scheduled to come in and see you.

THE COURT: Fine.

xxx (Plaintiffs' Exhibit 20 received in evidence.)

THE COURT: What was the recommendation? Was it that these rates would be retroactive or would take effect --

MR. DAVIDOFF: Retroactive, your Honor.

THE COURT: -- to November 1?

MR. HALLISEY: November 30, your Honor.

MR. DAVIDOFF: Excuse me, sir, I am sorry. There was a day certain specified. November 30.

THE COURT: November 30. So that it would have covered December.

MR. HALLISEY: Yes, your Honor.

MR. DAVIDOFF: Yes. And forward, of course.

MR. HALLISEY: And forward.

THE COURT: I just don't understand how a bunch of people from the state can just sit there in a situation like this. This is absolutely intolerable procedure. If I were you, I would jump up and try to explain myself. It is absolutely intolerable. Maybe the Mary Manning Walsh Home is the most mismanaged creature in the Western Hemisphere, I don't know, but here the State of New York, through the representative that was talking to these people, led them to believe orally and in writing that they would have ample rates as of November 30 and led them to believe that they were not required to make any cuts, so they would go along for weeks. And it is only January 31 that they finally get the message that the budget director has disapproved. This is intolerable. It is absolutely intolerable. Money is being spent. If they are supposed to cut, get busy and cut. But they are not going to cut as long as this thing is pending. They are not going to get cut with that attitude on the part of the Department of Health.

MR. DAVIDOFF: Your Honor, the only response I can give you is that it was our firm belief that the material submitted to the Division of the Budget would do the trick. We have gotten a response that is now admitted as an exhibit and we are making the most sincere and honest effort we can, starting today, to do a full assessment.

THE COURT: That does not take care of at least two months when they were simply lulled into making no cuts. It does not take care of it at all.

Mr. Rollo, you had better respond. This is really intolerable. I emphasized at the beginning of this litigation that we could not have this disparity between the Budget Department and the Department of Health; that there would have to be a working closely together. I am not satisfied with this as to any kind of due process at all.

MR. ROLLO: Your Honor, I was not here at the original hearing.

THE COURT: I mentioned in the transcript when we were together last.

MR. ROLLO: I understand. And I think there are a couple of things I should say to you.

No. 1, Budget did not even get a copy of the letter that Dr. Cicero wrote you.

THE COURT: That is not my fault; it is not the Walsh Home's fault.

MR. ROLLO: I agree.

THE COURT: That is between you and the Department of Health.

MR. ROLLO: And we have taken it up with them, your Honor.

THE COURT: What are you going to do about it?

MR. ROLLO: The only thing I can say, your Honor, is that if the Department of Health in the reassessment, which is a uniform procedure, finds that there are 301 nursing home patients there, then I think --

THE COURT: Skilled.

MR. ROLLO: -- skilled nursing home patients there, then I think we are prepared to honor that.

THE COURT: Why don't you go up tonight and find out? Why don't you and Mr. Davidoff go up there?

Would you welcome them there?

THE WITNESS: Yes, your Honor.

THE COURT: Can they count?

MR. DAVIDOFF: Your Honor, I can count from here to next week, but I don't know how to assess patient needs.

THE COURT: No, you get your staff up tonight.

MR. DAVIDOFF: They are there.

THE WITNESS: Your Honor, the staff is there coming.

THE COURT: You get up there and supervise. This is absolutely intolerable. And, Mr. Rollo, you get up there also. Both of you get up there tonight and you look this place over and you work on this. I want a report tomorrow.

All right?

MR. DAVIDOFF: Yes, sir.

THE COURT: That is all for Walsh Home for the moment.

MR. HALLISEY: Thank you, your Honor.

THE COURT: We will take a short recess.

(Recess)

MR. HALLISEY: Your Honor, may I be heard?

THE COURT: Yes.

MR. HALLISEY: Your Honor directed Commissioner Davidoff and Mr. Rollo to go to Mary Manning this evening. I spoke to both of those gentlemen, your Honor, and Commissioner Davidoff has told me that his staff will finish their survey by tomorrow, and the written report will be in his hands by Friday, and that he will communicate with the Director of the Budget through Mr. Rollo on Friday; that if we can get a decision of the Director of the Budget on Monday, your Honor, I don't think there would be any reason for these two gentlemen to go down there this evening.

THE COURT: That is fine.

MR. STERN: Your Honor, I would like to introduce Bruce Soden, of the Syracuse firm of Hancock, Estabrook, Ryan, Shove & Hust, who represents the Plaza Nursing Home.

THE COURT: What is your name, again?

MR. SODEN: Soden.

THE COURT: Bruce?

MR. SODEN: Yes, sir.

THE COURT: From Syracuse.

MR. SODEN: Yes, your Honor.

THE COURT: All right.

MR. SODEN: I would first like to say thank you for having us down here so you can hear our case. Our first witness will be the hospital administrator, Mr. Edward Leone.

Will you take the stand, please.

EDWARD LEONE, called as a witness in behalf of the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SODEN:

Q Mr. Leone, would you tell the Judge about the Plaza Nursing Home in a few sentences, skilled nursing, Article 28?

THE COURT: What is your first name?

THE WITNESS: Edward.

THE COURT: And your last name is Leone?

THE WITNESS: Leone, L-e-o-n-e.

THE COURT: What do you have to do with Plaza?

THE WITNESS: I am the administrator.

Q Would you tell the Judge how many beds Plaza Nursing Home has?

A Yes. Plaza Nursing Home has 242 skilled nursing beds and commenced operations on November 22, 1971.

Q You are an Article 28-A Not For Profit corporation?

A That's correct.

Q Your position there is hospital administrator?

A Yes, sir.

Q In that position you are familiar with the costs and the budget of Plaza Nursing Home?

A Yes, I am.

THE COURT: What are the figures? Let us try to get to the issues in the same way as we did in the other cases.

MR. SODEN: Fine, Judge.

THE COURT: Do you have any of these intermediate patients?

THE WITNESS: No, we do not.

THE COURT: So it is just --

THE WITNESS: Skilled nursing.

THE COURT: What was the rate before November 1?

THE WITNESS: The rate was $50.50.

Q What were your actual costs?

THE COURT: Just a minute.

MR. SODEN: Pardon me.

THE COURT: And then after 11/1?

THE WITNESS: $43.42.

THE COURT: $43.42.

THE WITNESS: Yes.

THE COURT: Have there been any changes in that in any form?

THE WITNESS: There was a new rate promulgated for January 1, 1977, which is now $45.07.

THE COURT: How far forward has your reimbursement gone? Have you been reimbursed for November?

THE WITNESS: Yes, I have.

THE COURT: Was it at the $43 rate?

THE WITNESS: Yes.

THE COURT: What about December?

THE WITNESS: Also $43.42.

THECOURT: Have you been reimbursed for January yet?

THE WITNESS: No, we haven't.

THE COURT: Do you know of any problem about the $45.07 rate?

THE WITNESS: No, I do not.

THE COURT: Has there been a discussion or has there been any appeal with the Department of Health?

THE WITNESS: We filed our appeal shortly after receiving the $43.42 rate, and there is a meeting today as a matter of fact at the New York State Health Department to listen to the recommendations on that appeal.

THE COURT: Have we got any records about the appeal? You say you filed something? Did you file a letter or a document or what?

THE WITNESS: I filed a letter.

THE COURT: Is that in evidence?

MR. SODEN: No, your Honor.

Q Do you have it with you, Mr. Leone?

A No, I do not.

MR. SODEN: We could furnish it to the Court if you like.

THE COURT: Do you remember the date of that letter?

THE WITNESS: No, I do not.

THE COURT: Was it in November?

THE WITNESS: I believe it would have been in November.

THE COURT: Does the state have a copy of the letter?

MR. DAVIDOFF: Your Honor, yesterday we started to meet on this project.

THE COURT: What?

MR. DAVIDOFF: Yesterday we started to meet on this project, and at your convenience I would like to return to that. But to answer your question specifically: With my own eyes yesterday our staff shows having received an appeal no earlier than December 21.

THE COURT: Do you know the date when they filed their appeal?

MR. SODEN: I do not know that date, your Honor. I apologize.

THE COURT: I will take it as December 21.

MR. DAVIDOFF: That is our date stamp.

THE COURT: Subject to correction.

MR. SODEN: We will submit that if you would like, your Honor.

THE COURT: Yes. What was done on that appeal, Mr. Davidoff?

MR. DAVIDOFF: Your Honor, on the appeal itself, very little has been done. We have identified in terms of appealable a small item, which is an absolute error on our part -- I say small relatively -- of $43,009, which translates roughly to an additional 49 cents in per diem. That was discovered during the course of our work yesterday. That is an out-and-out error.

On the merits of the appeal, notwithstanding the fact it was received in December, the priorities established by the plaintiffs in this case put Plaza at the lower end of the second group of facilities. Hence, the discussion only this week.

THE COURT: All right.

MR. DAVIDOFF: So we have just started the review of that.

THE COURT: I am just wondering what is accomplished. There will be discussions, and what is accomplished by having a discussion now in advance of finding out what the administrative agency will do?

MR. SODEN: Your Honor, it is the problem of cash. We have our accounts payable of $321 over 90 days.

THE COURT: What do you mean?

MR. SODEN: $321,000, I mean. We have to pay our vendors and get our medical supplies. The rates they have established for us won't allow us to continue operation.

THE COURT: But this is simply duplicating what is being told the agency.

MR. MISHKIN: Your Honor, I think the agency has already made its determination as to Plaza, and it is simply going to present them with suggested cuts, in the way they have done with every other one that has been through the process.

THE COURT: It has not been all that stereotyped. You try to put everything within the same cookie cutter and it just is not that way.

MR. DAVIDOFF: We attempted to do the same thing --

THE COURT: What is going on with the Plaza home now?

MR. DAVIDOFF: When this was presented in our staff review yesterday --

THE COURT: Who presented what?

MR. DAVIDOFF: Our own staff yesterday.

THE COURT: Presented?

MR. DAVIDOFF: To us. The facility was not there yesterday. This is our normal plan of action for all the facilities in the class action. We reviewed the material for cuts.

At the end of that presentation, I said, "What appeals are there?" And they said, "Well, we have identified this minor error," which we are obligated to correct. In addition, we received on the 21st of December an appeal, which we have not even looked at yet, because we havebeen working on the other earlier priorities established in the case. I said that in view of the fact that Plaza is now here today in New York, even though you are going to be meeting with them today, you must now put direct primary attention on that appeal.

THE COURT: Who is doing what today?

MR. DAVIDOFF: Today that staff was working with representatives of Plaza in Albany, primarily going -- primarily going -- over the proposed cuts. But, in addition, and I urged our staff to start to discuss the appeal with the Plaza representatives --

THE COURT: There is a little confusion. I did not know that the -- when you say "cuts," you mean cuts that would --

MR. DAVIDOFF: Go towards the deficit.

THE COURT: -- go to cutting the deficit, and the deficit that would be based on the existing rates. Right?

MR. DAVIDOFF: Yes, sir.

THE COURT: In other words, if there is a deficit produced under the existing rates, then when you talk about cuts, you mean cuts to eliminate that deficit.

MR. DAVIDOFF: That is right. Savings.

THE COURT: All right. When you talk about an appeal which would raise the rate, right?

MR. DAVIDOFF: Yes, sir. That is exactly what I mean.

THE COURT: So do I understand that there is going on a discussion both of your recommended cuts and I guess it must follow that if you are talking about what you say their appeal is, you are talking hearing them as to why they should have higher rates?

MR. DAVIDOFF: That is correct.

THE COURT: And it means why they should not make cuts. Right?

MR. DAVIDOFF: No; again, sir, as in the case of Loretto, it is the same thing. The recommended cuts do not do the job.

THE COURT: In other words, your recommended cuts don't eliminate all the deficit.

MR. DAVIDOFF: That is correct.

THE COURT: I take it that it must be that in all these cases you are willing to hear their side --

MR. DAVIDOFF: Yes, sir.

THE COURT: -- as to any recommended cuts.

MR.DAVIDOFF: Yes, we are.

THE COURT: Of course.

MR. DAVIDOFF: We are.

THE COURT: And then --

MR. DAVIDOFF: There is still a shortfall.

THE COURT: There is still a shortfall, and so you want to arrive at some conclusion about that overall picture; right?

MR. DAVIDOFF: That is correct.

THE COURT: And the representatives of the department are meeting with representatives of Plaza today; right?

MR. DAVIDOFF: Yes.

THE COURT: When do you expect the conclusions to be reached?

MR. DAVIDOFF: Frankly, until you asked the question, as far as the appeal is concerned, I am willing to make a commitment on our part, in view of the fact that they now allege the severe shortage, although I stress that by their own grouping they were in the last ones of the ones given to us.

THE COURT: I heard that.

MR. DAVIDOFF: We could complete our review of that appeal, including perhaps time to go back and ask more questions of the facility, by Tuesday of next week.

THE COURT: All right. The letters that establish the priorities I think ought to be marked for identification.

Have you got those letters?

MR. DAVIDOFF: I do not, sir.

MR. MISHKIN: I do, sir. This was among the correspondence that had been sent.

THE COURT: I know it, but let us have them made an exhibit. If they are to be exhibits, they ought to be marked as exhibits.

MR. MISHKIN: Your Honor, there are a total of five letters that were sent by the New York Association of Homes for the Aging to Dr. Cicero listing facilities.

THE COURT: Let us have them in order. Let us have them marked for identification.

MR. MISHKIN: There is one dated December 30, 1976, which would be 21.

(Plaintiffs' Exhibit 21 marked for identification.) xxx

MR. MISHKIN: January 3, 1977.

(Plaintiffs' Exhibit 22 marked for identification.) xxx

MR. MISHKIN: Next one is January 7, 1977.

(Plaintiffs' Exhibit 23 marked for identification.) xxx

MR. MISHKIN: And then there are two letters dated January 25, 1977.

(Plaintiffs' Exhibits 24 and 25 marked for identification.) xxx

THE COURT: I will receive all of these letters, 21 through 25, for the purposes of this hearing.

(Plaintiffs' Exhibits 21 through 25 received in evidence.) xxx

THE COURT: It is exactly right that there was a letter of December 30 listing a number of nursing homes.

MR. MISHKIN: Plaza is on the January 3 letter.

THE COURT: Right. And it is way down the list. And if I were the Department of Health I think I would probably follow the list more or less.

MR. MISHKIN: We understand, your Honor. But this just shows, there are so many homes around the state that are in the kind of financial condition that Plaza is in, that we could be here for five weeks with three or four homes a day. I did not understand that that was the procedure that we were to embark on, certainly not in a class action.

THE COURT: No, I was not intending to be here for five weeks. I was intending to have the work done in the administrative process, and you were to furnish lists --

MR. MISHKIN: We did furnish lists, your Honor, as you suggested. And the administrative process, as Dr. Cicero promised, would be completed no more than three weeks from the date he got it. He got this January 3. It is now February 9 and we are being told it is started.

THE COURT: That does not shock me.

MR. DAVIDOFF: Excuse me, your Honor. We did not commit ourselves to three weeks for the second list. The three weeks was for the first list.

THE COURT: You have got the transcript. Tell me where this agreement was to complete all the suggested homes in three weeks.

MR. MANTZOROS: The first thirteen.

MR. MISHKIN: Your Honor, I will have to go through the entire transcript to find it.

THE COURT: Well, this is an important point. You say there was a commitment. Where is the commitment?

MR. SODEN: Your Honor, might I be heard, please?

THE COURT: I want to find out the commitment. If they broke the commitment, they broke the commitment.

MR. STERN: Mr. MacHarg referred to thirteen homes as the commitment. Perhaps he has found it, your Honor?

THE COURT: I have a reference on pages 101 and 102 of the December 22 minutes.

MR. MISHKIN: I think there it is, yes, it is on

102.

THE COURT: Mr. Stern said that he could identify homes which need the help to the greatest extent. Then I said to Dr. Cicero that I was dealing with a total number of 119, and I said let's just pick a figure out of thin air, and I said let's suppose there were thirty that after a good-faith selection the plaintiffs' lawyers would say really needed emergency consideration. And I said I didn't know whether thirty was right or not. I think I had asked Mr. Stern possibly to tell me how many homes were really in what he called dire condition, and obviously that was an impossible question.

MR. MANTZOROS: Dr. Cicero's January 6 letter.

THE COURT: Just a minute, please. Then I said, well, let's pick thirty as a for instance. I asked Dr. Cicero how quickly he could process thirty cases. Then Dr. Cicero said that given the number 30 and given the one other factor, given the problems of documentation and so forth, he said he thought he could process thirty in two to three weeks, and he said, "And I have to put a perhaps, because there may be other things that I can't foresee" -- I am paraphrasing. He said, "I am talking about slicing four to six weeks basically in half after we receive the documentation."

All right, we have a letter dated January 3. Let us see how many homes. This is the 25th home on the total list. When was the documentation furnished? Was documentation furnished?

THE WITNESS: Yes, it was.

THE COURT: When?

THE WITNESS: On February 1. I would indicate that we would --

THE COURT: He certainly hasn't broken any commitment to Plaza.

THE WITNESS: We were --

THE COURT: Because he said two to three weeks after getting the documentation.

MR. SODEN: Your Honor, if you question the witness you will find out that Plaza has already been through in December the same evaluative process. We already went through it with the Health Department. We have the exhibit with us, No. 26, and it has got us nowhere since December.

THE COURT: We are in a different climate. I am prepared, at least for now, to go through and review with the lawyers and the parties the results of these procedures, and it seems to me, at least on the two homes we have covered today, it has been very fruitful. The situation with Loretto has immensely clarified over what it was before, and the issues are narrowed, and you have gone into them.

The situation as to the Walsh Home, you were here, each situation involves its own peculiar circumstances.

It may be there is a lot to criticize, or maybe there isn't, on what the state has done, but at least I find out. I think what they are doing now -- if I am going to consider relief, I have got to base it on either what administrative relief was given or not given. That presents the issue. It would be absolutely ridiculous for me now to sit here and even talk about the Plaza Home if there is an administrative review.

I am going to put off any consideration of the Plaza Home until after Tuesday, and I am going to expect the findings to be made no later than Tuesday. That concludes the proceedings now about the Plaza Home. Thank you very much.

(Witness excused)

THE COURT: We will go on to the next home. Is there a fourth one, Mohawk?

MR. MISHKIN: There was going to be. Mr. Howard Collins, who was here, had to leave. So we have no further homes today.

THE COURT: Fine.

MR. MISHKIN: But, your Honor, the problems that we have in this class action transcend these individual cases, and I think that since November 19 we have seen a process that your Honor has suggested that we meet with the state. When we appear in court, there are new statements made by the defendants and new things are disclosed for the first time and we are sent back to discuss with them and see where we go from here. But at this point, your Honor, on behalf of the class that we represent, we are prepared to rest on the record as it is now.

THE COURT: Then I will tell you right here and now that I will deny the motion for preliminary injunction on a class basis. I do so on the basis of the record that demonstrates to me that when the facts are gone into as to the individual homes, there is a wide and substantial discrepancy as to the issues as to each individual home. This has been true of every single situation which I have inquired about and which has been presented to me.

MR. MISHKIN: Your Honor --

THE COURT: If you will let me finish, I will make my findings and conclusions, because I am finally resolved on this and I can so state right now.

The record amply demonstrates that there are differences in the rates granted to the homes. There are differences in the rates granted to the homes. There are differences with respect to the procedures engaged in by the Department of Health and the Department of the Budget with respect to these homes. There are differences, substantial differences, in the financial condition of the different homes. There are substantial differences in the effect of the various rates. The transcript of today's

(continued on next page)

hearing will demonstrate that beautifully. I would not add one word in my judgment to the transcript of today's hearing to support my findings in this regard.

I think when we are dealing with requests for relief which would involve the payment of millions of dollars of additional money to the members of the plaintiff class over what rates may be in effect, this is something which this Court must view seriously, it must view carefully, and it cannot, in my view, be dealt with on a mass basis no matter how much work is involved. If it becomes too burdensome to be handled by this Court, at least by me as an individual judge, there will be a way found to handle it. But the solution is not to indulge in some broadbrush treatment, which I would regard as simply sloppiness. And I won't do it that way.

If the process becomes too burdensome, there are magistrates and indeed there might be a procedure for the appointment of a master. That is a way it can be handled.

But the thing that will not be done, unless higher authority directs it to be done, is to deal with this on a mass basis.

For those reasons I am denying the preliminary injunction as to the class.

However, I am not denying the preliminary injunction and I am reserving my decision with respect to individual cases of individual homes that wish to present evidence to me. I will hear those cases, and I will hear them as expeditiously as I can, and I will hear them in the fashion that I have heard cases today.

I think the record should reflect that as of December 22 the motion for a preliminary injunction was in effect withdrawn, except as to requests for relief for the months of November and December, and it was not until about the 31st of January or the 1st of February that I heard about any reactivation of the preliminary injunction motion. We had a hearing on February 4. We are now having a hearing on February 9 at the request of the plaintiffs, on the representation that there were certain homes in dire condition, threats of closing, and so forth. We have taken this day. I have heard the evidence in detail on the Loretto Home and the Walsh Home. I must say the evidence was most revealing, and the record shows what the results have been.

I would have heard the evidence on the Plaza Home, except for the fact that the administrative review as to that home is now in process. I don't regard the chronology as involving any violation of any obligation on the part of the state to this Court or otherwise in the review procedure. I am willing and prepared to somehow meet with counsel about the Plaza situation the minute the administrative findings are finished Tuesday, and if not the minute after, within some very short period of time.

I would have heard the evidence as to Mohawk Valley, only the man from Mohawk Valley did not stay around. We have therefore dealt with the four homes which were proposed for submission to me today: Loretto, Mary Manning Walsh, Plaza, and Mohawk Valley.

MR. STERN: May I be heard, your Honor?

THE COURT: I want to make this very clear, because it may be that the lawyers will wish to appeal, and they can attempt to do that: I am denying the motion for a preliminary injunction insofar as it seeks relief on a broad class basis, but I make no such denial and I intend, if anybody wishes me to do so, to proceed with appropriate hearings on a case-by-case basis within my capacity. If the matter gets to be too burdensome, there are other procedures we can devise.

MR. STERN: Your Honor, may I be heard?

THE COURT: Yes.

MR. STERN: Your Honor, I appreciate your entry of an order and your willingness to continue hearing the homes that may come in. But you added some remarks to your decision about the renewal of the application. I would like to state for the record --

THE COURT: I think the record shows exactly in black and white what was stated on December 22, and that any appellate court can read.

MR. STERN: Might I state something for the record, your Honor?

THE COURT: And that is all.

MR. STERN: Might I state something for the record, your Honor?

THE COURT: Yes.

MR. STERN: We submitted to the procedure which your Honor suggested to the state and we did submit letters on January 3 and thereafter with respect to homes. The week before January 31, when it became apparent to us that the state was merely going for the most part to meet with the homes and tell them what cuts to make, we called your chambers to request an immediate appointment. Unfortunately, your Honor was detained on other business out of town and was not going to be returning until the 31st. Originally the hearing was scheduled for the 31, and at the request of the state it was adjourned for the 4th.

With respect to that chronology, I just wanted to state our position for the record. Thank you.

MR. SODEN: Your Honor, might I be heard, please, on behalf of Plaza?

THE COURT: Yes.

MR. SODEN: As I heard your remarks, I believe you indicated a willingness to continue to hear the motion as regards the four homes and specifically my client.

THE COURT: Of course. If you want it heard. If you want to drop this procedure and you want to go up to the Court of Appeals on a strictly class basis, that is your privilege. I don't want to press this upon you. And if you don't wish to continue in the procedure that I suggest, you have every right to decline it.

MR. STERN: Your Honor, the most important thing to us --

MR. SODEN: That is what I would like to do on behalf of Plaza.

MR. STERN: On behalf of the class, I state to your Honor that the two most important things for us on a home-by-home basis were to both secure relief for the class and not to permit the nursing homes to go out of business or to suffer patient reduction.

THE COURT: It is entirely up to you. I am available on an individual basis, but obviously I don't want to force that upon the plaintiffs if they don't wish to go that route. You let me know what your wishes are.

MR. STERN: The plaintiffs wish to go that route, your Honor, while at the same time considering the prospect of an appeal as well, as your Honor indicated.

THE COURT: All right.

MR. STERN: Thank you.

(An adjournment was taken at 5:50 p.m.)

Plaintiffs' Exhibit 17

STATE OF NEW YORK • DEPARTMENT OF HEALTH
TOWER BUILDING • EMPIRE STATE PLAZA • ALBANY, N.Y. 12237

BUREAU OF HEALTH FACILITY FINANCING

ROBERT P. WHALEN, M.D.
COMMISSIONER

EDWARD E. STREVY
DIRECTOR

January 13, 1977

President and Members of
the Board of Directors
Loretto Rest Nursing Home Co., Inc.
417 Churchill Avenue
Syracuse, New York 13205

Attention: Mr. John H. Clancy

Re: Loretto Rest Nursing Home Co., Inc.
CNY-142, Onondaga County

Dear Board Members:

We have been informed by the trustee that your facility is three mortgage payments in arrears. We have also been advised by your facility that no further payments would be made until the rate certification problems were resolved.

This drastic action is a very serious matter and causes certain remedial activities to be initiated by the Department. Since you have deliberately chosen to violate the terms of your mortgage, the Department is reviewing the personal responsibilities and liabilities of the Board of Directors under Article 28 of the Public Health Law for appropriate action.

While this Bureau understands the fiscal problems some of our mortgage facilities are experiencing, your action is no solution and only forces us to take the steps mandated under our responsibilities as the agent for the mortgagee to protect the note and bond holders who provided the funds to build your facility.

Unless all the delinquent mortgage payments are submitted by January 27, 1977 and future payments kept current, I will recommend that the Commissioner appoint a member to the Board of Directors as provided under section 2853 of Article 28-A. In addition, such other necessary legal proceedings including those leading to mortgage foreclosure will be initiated.

Very truly yours,

Edward E. Strevy
Director

nd

cc: Ms. Rhea Clark
Mr. John Costello
Mr. Charles Fahey
Mr. James Egan
Reverend Francis Harrison
Ms. Charlotte Holstein
Mr. David Jasper
Mr. Martin Kendrick
Mr. Frances Singer
Mr. Norman Harper
Mr. Donald Davidoff
Mr. Edward Bopp
Robert Bacorn, M.D.

PLAINTIFFS' EXHIBIT 18

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK ASSOCIATION OF HOMES FOR AGING, INC., ET AL., Plaintiffs	:	76 CIV. 5113 (TPG)
-against-	:	
PHILIP L. TOIA, ET AL., Defendants	:	Affidavit of Mary Manning Walsh Nursing Home Company, Inc.

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Mother M. Aloysius McBride, being duly sworn, deposes and says:

1. That she is and has been the Administrator of the Mary Manning Walsh Nursing Home Company, Inc. (the "Home"), since its opening in 1969. She has been a member of the Carmelite Sisters for the Aged and Infirm since 1935. The Home presently has 362 residents.

2. The arbitrary rates, effective November 1st, 1976* and January 1st, 1977*, issued by the Department of Health to the Home are erroneous and are causing a financial disaster.

3. In order to meet the payroll for the week ending February 5th, 1977, the Home could not pay the following January mandated expenses:

a) Operating Escrow Fund	$14,151.58
b) Mortgage repayment fund	$68,958.33

4. The Home will not be able to pay the aforementioned mandated monthly expenses again in February in order to meet its February 12th, 1977 payroll. In addition, the Home will have to find a source to borrow approximately $50,000 to pay its employees for the week ending February 19th, 1977. Thereafter, the Home will need approximately $158,000 each month, above its present income to meet its expenses.

---

* See Rate Schedule Page 3 of the affidavit.

5. The Home cannot discharge enough employees to pay from its present income the weekly payroll without lowering the level of care to its residents below the standards set by the Department of Health and other regulatory agencies.

6. The Home cannot continue to borrow money since it has not any means of repayment and eventually the January 1st, 1977 rates* will result in the Home filing a petition in bankruptcy.

7. The Home received funds from Medicaid in January 1976 of $442,491.00. (SNF - $376,458; HRF - $66,033); for January 1977 it received from Medicaid $275,846 (SNF - $227,200; HRF - $48,646). This monthly decrease in cash of $166,645 which is the result of the January 1st, 1977 rates* is too drastic a cut in Medicaid funds.

8. Presently the Home has accounts payable of $396,766 (vendors) and an outstanding bank loan of $125,000. These debts cannot be repaid from the income received by the rates as of January 1st, 1977*.

9. After this law suit was commenced and the Court was informed of the precarious financial condition of the Home as a result of the new rates effective November 1st, 1976*, the Department of Health notified, by letter (Exhibit "A"), dated January 6th, 1977 the Honorable Thomas Griesa, District Judge of the Southern District of New York, that the Home's 1976 rates would be increased on the basis of new bed re-certification. The Department of Health, by letter, dated January 11th, 1977, notified the Home that its operating Certificates have been revised, effective November 30th, 1976 (Exhibit "B"). By letter, dated January 27th, 1977, the Department of Health mailed to the Home its revised Operating Certificates which must be publicly displayed (Exhibits "C" and "D").

---

* See Rate Schedule page 3 of the affidavit.

On January 24th, 1977, the Home received from the Department of Health its January 1st, 1977 rates*, which rates completely disregarded all the letters stated above and are based on the old certification of beds. The January 1st, 1977 rates* are in error as they are not the rates to be applied to a facility which has been certified to have 300 or more SNF beds.

It is our belief that the Division of Budget is unlawfully informing the Department of Health not to issue the corrected rates to the Home. This interference by the Division of Budget is without any known statutory authority.

10. The Home respectfully requests that the Court order the Department of Health to issue to the Home those rates which are consistent with the recertification as stated in Exhibits "C" and "D". Those rates would be effective as of November 30th, 1976*; the date of the recertification plus the 4% increase as of January 1st, 1977.

Mother M. Aloysius McBride
Mother M. Aloysius McBride,
Administrator

Sworn to before me this

8th day of February, 1977

RICHARD C. McLYNN
Notary Public, State of New York
No. 03-7831459
Qualified in Bronx County
Commission Expires March 30, 1977

---

* Rate Schedule - Mary Manning-Walsh Nursing Home Company, Inc.

	SNF	HRF	
Effective January 1st, 1976	$62.56	$41.83	(rates based on 1975)
Effective November 1st, 1976	$53.48	$37.73	(rates retroactive to 1/6/75)
Effective November 30th, 1976 (Not Issued)	$65.55	$36.36	(rates based on revised Operating Certificates)
Effective January 1st, 1977	$55.42	$39.05	(rates to March 1st, 1977)

EXHIBIT "A"

2033

January 6, 1977

Honorable Thomas Griesa
Justice of United States District Court
Southern District of New York
United States Court House
Foley Square
New York, New York 10007

Dear Judge Griesa:

The New York Association of Homes for the Aging, by letter dated December 30, 1976, has submitted a partial list of its member facilities for our review in accordance with your directions. The Association subsequently asked us to add the Home for the Aged Blind. Acting on our own initiative, we have also added the Lemberg Home to the Association list of 12 facilities for a total of 13.

Enclosed please find our plan of action for reviewing the position of those residential health care facilities which claim to sustain significant losses. This plan has already been partially implemented. Our detailed review has begun.

Each facility has been asked to supply certain current information, so as to expedite the review process. I enclose copies of the 13 individual letters which have been transmitted.

Specific relief has been granted by this Department to three of the homes: Loretto Rest, Mary Manning Walsh and Hebrew Home at Riverdale.

For Loretto Rest, we recently computed new 1976 cost based rates of $48.13 for its nursing home, $31.54 for its health related facility, and $13.26 for its outpatient services. In addition, a partially completed patient assessment review will increase the rates to that of $55.90 and $39.51, respectively. The original rates were $42.30, $27.14, and $11.23.

BEST COPY AVAILABLE

JAN 13 1977

The Walsh 1976 rate will be increased, on the basis of a new bed certification, from $53.48 in the nursing home to $65.55 and slightly decreased in the health related facility from $37.73 to $36.36.

The Riverdale 1976 rate, on the basis of an administrative grouping decision, will go from $48.72 to $60.67.

We are confident that our reviews can be completed within three weeks, on the assumption that the requested data is received from the facilities in a timely manner. You have my assurance that everything possible will be done to produce proper resolutions for every one of those facilities requiring relief.

Sincerely yours,

Frank T. Cicero, M.D.
Second Deputy Commissioner

cc: Mr. Nurick
Mr. Stern

Enclosures

Plan of Action

Federal Non-Profit Nursing Home Rate Case

The following plan of action will be undertaken and completed within three weeks. The plan is designed to allow for an orderly, timely and meaningful review of those non-profit nursing home appeals submitted to the Department as enumerated by the New York Association of Homes for the Aging on December 30, 1976. When and if other facilities are added to the list of those sustaining substantial losses, the plan of action will be applied in as timely a manner as possible.

1. Preparation of list of pertinent and essential items of information required by the Department from each facility. This list will be transmitted immediately to the facilities, since timely review depends in large measure upon prompt receipt.

2. Preparation of fiscal fact sheet by the Bureau of Health Care Reimbursement (Nursing Home or Hospital Section) for each of the cited facilities. This fact sheet will be based on the latest quarterly costs submitted by the Article 28A homes. For the others, the latest cost report should be used. In any event, the most current cost information should be utilized.

This fiscal profile should include information regarding beds, percentage of medicaid patients, cost center ranking information, rate information for 1975, 1976 and the first quarter of 1977, 1976 annual deficit, November and December deficits, 1977 projected deficits based on new rate, and all other pertinent information regarding the fiscal operations of the facilities.

3. The Bureau of Health Care Reimbursement will also provide information regarding any pending rate appeals. Included in the appeal analysis should be the impact on rates if the appeals were to be approved, status of appeals, and their chances for fiscal approvability.

4. Steps 2 and 3 will be initiated through a memorandum from Dr. Haughie to Mr. Giglio requesting this information within five working days. Mr. Giglio will be requested to send these fiscal fact sheets to Dr. Haughie as they are completed.

5. Dr. Haughie will forward fiscal profiles to the Division of Facility Standards. These reviews will determine the exact staff needed for the program review meetings.

6. Program review meetings will be scheduled commencing the week of January 10th to determine areas in which each facility can make cost saving cuts. These meetings will include staff, as determined in step 5, from the regional offices (including the Assistant Regional Health Director, Health Program Administrator, Senior Nurse and other disciplines); staff from the Bureau of Health Care Reimbursement, and related central offices (Nursing Services, Social Work, Rehabilitation Therapies, Nutrition, Facility Environmental Control and Geriatrics and Long Term Care). Geriatrics and Long Term Care will chair each scheduled meeting. Additionally, staff of the Central Enforcement Unit will be involved during these meetings.

It is expected that each meeting (which will probably last a full day) will result in a package of recommended cuts to enable the facility to offset its anticipated deficits, and in some cases to effect even further savings. The document will be completed during the course of the meeting.

7. The final review, with mandated program cuts, will be discussed in detail with each facility on the work day following the program review meeting. A copy of each final review will be transmitted to the Court.

2037

④

STATE OF NEW YORK
DEPARTMENT OF HEALTH

NEW YORK CITY OFFICE
2 WORLD TRADE CENTER
NEW YORK, N. Y., 10047
(212) 488-3939

ERT P. WHALEN, M.D.
COMMISSIONER

EXECUTIVE DIVISION

J. WARREN TOFF, M.D., M.P.H.
ASSOCIATE COMMISSIONER
FOR NEW YORK CITY HEALTH SERVICES

January 11, 1977

Mother M. Aloysius McBride
Administrator
Mary Manning Walsh Home
1339 York Avenue
New York, NY

Dear Mother Aloysius:

Please be advised that our Department has approved a temporary conversion of 30 HRF beds to 30 nursing home beds effective November 30, 1976. You will shortly receive the revised operating certificates to reflect the following bed capacity:

301 Nursing Home Beds
61 HRF Beds

This is a temporary measure based upon current needs for skilled nursing beds at your facility. This approval does not sanction any construction. Requests for structural changes, if warranted, must be submitted through the usual Article 28 mechanism by submission of a Part I Application.

If you have any questions regarding this matter, please do not hesitate to contact me.

Sincerely,

Nasry Michelen, M.D.
Director
Office of Hospital and Long Term Care

cc: Dr. Toff
Mr. De Freest

EXHIBIT "B"

CERTIFICATE NO 7002305

CERTIFIED BEDS 301

State of New York
Department of Health

EFFECTIVE DATE 11/30/76

NURSING HOME

OPERATING CERTIFICATE

EXPIRATION DATE

MARY MANNING WALSH NURSING HOME COMPANY INC
1339 YORK AVENUE
NY NY 10021

OPERATOR: VOLUNTARY CORPORATION

Has been granted this operating certificate pursuant to Article 28 of the Public Health Law for the service(s) specified:

ACTIVITIES PROGRAM
CLINICAL LABORATORY
DENTISTRY
MENTAL
OCCUPATIONAL THERAPY
PHARMACY
PHYSICAL THERAPY
PHYSICIAN SERVICES
PODIATRY
SOCIAL WORK SERVICES
SPEECH THERAPY
VISION SERVICES
X-RAY (DIAGNOSTIC)
****

"This certificate for 301 nursing home beds is issued by the Department and accepted by the operator with the specific understanding and upon the condition that it is issued for a temporary period and shall expire on a date to be determined by the Commissioner in his sole and absolute discretion and no later than July 31, 1978."

Certification Officer

Robert P. Whalen, M.D.
Commissioner of Health

HA1(7/76)

THIS CERTIFICATE MUST BE CONSPICUOUSLY DISPLAYED ON THE PREMISES

EXHIBIT "C"

2038

CERTIFICATE NO. 7002809

CERTIFIED BEDS 46

State of New York
Department of Health

EFFECTIVE DATE 11/30/76

HEALTH RELATED FACILITY

OPERATING CERTIFICATE

EXPIRATION DATE 07/31/78

MARY MANNING WALSH NURSING HOME COMPANY INC
1339 YORK AVENUE
NY NY 10021

OPERATOR: VOLUNTARY CORPORATION

Has been granted this operating certificate pursuant to Article 28 of the Public Health Law for the service(s) specified:

ACTIVITIES PROGRAM
DENTISTRY
MENTAL
OCCUPATIONAL THERAPY

PHARMACY
PHYSICAL THERAPY
PHYSICIAN SERVICES
RESIDENT PERSONAL SERVICES

PODIATRY
SOCIAL WORK SERVICES
SPEECH THERAPY
X-RAY (DIAGNOSTIC)
****

Certification Officer

Robert P. Whalen, M.D.
Commissioner of Health

HA1(7/76)

THIS CERTIFICATE MUST BE CONSPICUOUSLY DISPLAYED ON THE PREMISES

EXHIBIT "D"

2039

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,
JOHN F. KELLY

Attorney for

Office and Post Office Address
1780 Broadway
Borough of Manhattan New York, N. Y. 10019

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19
at M.
Dated,

Yours, etc.,
JOHN F. KELLY

Attorney for

Office and Post Office Address
1780 Broadway
Borough of Manhattan New York, N. Y. 10019

To

Attorney(s) for

Index No. CIV. 5113 Year 19 76

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK ASSOCIATION OF HOMES
FOR AGING, INC.,

Plaintiffs,

v.

PHILIP L. TOIA, ET AL.,

Defendants

AFFIDAVIT OF MARY MANNING WALSH NURSING HOME COMPANY, INC.

KELLY & HALLISEY
~~JOHN F. KELLY~~

Attorney for Mary Manning Walsh Home

Office and Post Office Address, Telephone
1780 Broadway
Borough of Manhattan New York, N. Y. 10019
Telephone 765-3840

To

Attorney(s) for

Service of a copy of the within
, is hereby admitted.

Dated,

Attorney(s) for

1900—©1963, JULIUS BLUMBERG, INC., 80 EXCHANGE PLACE, N. Y. 4

W [illegible]

To me the [illegible] are not [illegible] may still [illegible] if appropriate

204

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF THE BUDGET
STATE CAPITOL
ALBANY 12224

ETER C. GOLDMARK, JR.
DIRECTOR OF THE BUDGET

F

January 27, 1977

RECEIVED
JAN 31 1977
DIVISION OF HEALTH CARE FINANCING

N.Y.S. DEPT. OF HEALTH
[illegible]
RECEIVED
[illegible] 28 1977

Robert P. Whalen, M.D.
Commissioner
Department of Health
Tower Building
Empire State Plaza
Albany, New York 12237

Dear Dr. Whalen:

I am returning to you rate appeals by Mary Manning Walsh Nursing Home and Hebrew Home for the Aged/Palisades Nursing Home. Since meeting with your staff last week to discuss the status of these and other appeals which Judge Griesa has ordered be promptly resolved, we have made a careful inquiry into the facts of these two cases. The rest have not yet been transmitted to the Division of the Budget.

Based on what we now know about the Mary Manning and Hebrew Home cases, we do not believe there is sufficient justification to promulgate the higher rates as sought in the appeals. This is explained below.

Mary Manning Walsh

This facility is seeking to change its bed mix by reclassifying 20 of its health related beds to skilled nursing beds and adding 10 new skilled nursing beds. The impact of this action would be to place the facility in a different grouping (300 skilled nursing beds and above) with higher cost ceilings, thus allowing a higher rate. The specific change sought is as follows:

	From	To
SNF Beds	271	301
HRF Beds	76	56

Besides bringing the facility's skilled nursing bed capacity just over the threshold of the more favorable grouping, this action would increase the percentage of total beds being reimbursed at the higher skilled nursing rate. This would have a gross annual Medicaid impact of $1,285,767. Our two major concerns with this appeal, however, are not with the increased cost per se, but whether it is programmatically necessary.

Plaintiff's Exhibit 19

First, the conversion of 20 health related beds to skilled nursing beds is deemed necessary by the facility because the patients in these particular beds require skilled nursing care--not because the facility as a whole needs more skilled nursing beds. A review of this facility by New York City Regional Health Department nursing staff undertaken in response to this appeal focused only on these 20 patients, thus overlooking the possibility that some [illegible] the other 271 skilled nursing patients in the home could be adequately cared for at a HRF level. Statewide patterns show considerable patient misplacement in nursing homes and while this facility could be an exception, the Department did not document this. Regional Office staff did point out to us that a 100 percent Periodic Medical Review was performed last March in this facility, but the focus of this review, according to the staff, was on the quality of care, not the appropriateness of placement. In sum, we find no clear demonstration, either by the Department or the facility, that the bed conversion is necessary.

Second, the need for increasing the facility's skilled nursing bed capacity by 10 is not established in the appeal. In fact, we learned that the Bureau of Facility Planning in the Health Department--which has responsibility to review the need for additions in bed capacity--recommended disapproval in September of an application [illegible] Mary Manning to add 10 new SNF beds. (It is unclear to staff of that Bureau whether these are the same beds involved in this appeal.) This was done because there are currently more than 1,000 excess skilled nursing beds in Manhattan where Mary Manning is located. At the same time, there is a severe shortage of health related beds in that region. In view of these circumstances, it is difficult to understand why the Department through its reimbursement process would act to approve an appeal which adds more skilled nursing beds to the region and shrinks the supply of HRF beds while another part of the Department is working in exactly the opposite direction to correct severe bed supply imbalances.

Hebrew Home for the Aged/ Palisades Nursing Home

The operators of these facilities are seeking relief from ceiling penalties through this appeal by arguing that since the facilities are managed jointly and are physically contiguous, they should be grouped as a single facility of over 300 beds. (Separately, each has a capacity of under 300 beds.) This would remove virtually the entire ceiling penalty they are now subject to and would have a gross Medicaid impact of $3.2 million. Again, we have two major concerns which are programmatic in nature.

BEST COPY AVAILABLE

First, the operators are seeking relief from ceilings through subtle change in the normal rate-making methodology when a direct thod for obtaining relief is available within the existing methodology. rmally, each facility receives a separate rate which is largely termined by the ceilings for the group in which the facility is aced. The operators in this case are not asking for a composite te but merely that for grouping purposes they be considered as a ngle facility. The higher resulting ceilings would then be applied the separate rates of each facility, thus mitigating ceiling nalties.

The Department apparently agrees that this methodological ange is justified in this particular case because of the "unique" ysical connection of the facilities. Nothing, however, in the partment's supporting documentation speaks to the programmatic need these facilities for relief from ceilings.

Part 86-2.14(7) of the Commissioner's Regulations states at in order to obtain relief from ceiling penalties "a residential alth care facility must demonstrate that its range of approved rvices, patient mix, lengths of appropriate stays or other pertinent ctors are direct causes for all or part of the costs in excess of the ilings." Since these factors were not evident in the Department's nsideration of the appeal, we find it difficult to approve the vised rate merely because the physical proximity of the facilities rmits some sharing of services and joint management.

Second, the intent of allowing the side-by-side construction the two facilities was to permit savings that might be achieved rough shared services or joint management even though, by law, each is equired to remain separate as evidenced by:

- Separate operating certificates;
- Separate boards of directors;
- Separate bookkeeping and different calculations of capital and allocation of costs;
- Separate physical plants (even though connected by a tunnel);
- Separate ratings; and
- Separate reimbursement rates.

The Department, to our knowledge, did not seek to determine where savings might be achieved because of the contiguous location of the facilities which opens "unique" opportunities for shared services. In fact, by approving the appeal as presented, it is agreeing to substantially higher levels of reimbursement in direct contradiction of these anticipated economies.

In view of the above, I am returning these appeals unapproved.

Sincerely,

Paul J. Elston

Paul J. Elston
Deputy Director

Enclosure

cc: P. C. Goldmark, Jr.

Plaintiffs' Exhibit 20

2045

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF THE BUDGET
STATE CAPITOL
ALBANY 12224

PETER C. GOLDMARK, JR.
DIRECTOR OF THE BUDGET

January 27, 1977

NYS DEPT OF HEALTH
[illegible]
RECEIVED
JAN 28 1977

Robert P. Whalen, M.D.
Commissioner
Department of Health
Tower Building
Empire State Plaza
Albany, New York 12237

Dear Dr. Whalen:

I am returning to you rate appeals by Mary Manning Walsh Nursing Home and Hebrew Home for the Aged/Palisades Nursing Home. Since meeting with your staff last week to discuss the status of these and other appeals which Judge Griesa has ordered be promptly resolved, we have made a careful inquiry into the facts of these two cases. The rest have not yet been transmitted to the Division of the Budget.

Based on what we now know about the Mary Manning and Hebrew Home cases, we do not believe there is sufficient justification to promulgate the higher rates as sought in the appeals. This is explained below.

Mary Manning Walsh

This facility is seeking to change its bed mix by reclassifying 20 of its health related beds to skilled nursing beds and adding 10 new skilled nursing beds. The impact of this action would be to place the facility in a different grouping (300 skilled nursing beds and above) with higher cost ceilings, thus allowing a higher rate. The specific change sought is as follows:

	From	To
SNF Beds	271	301
HRF Beds	76	56

Besides bringing the facility's skilled nursing bed capacity just over the threshold of the more favorable grouping, this action would increase the percentage of total beds being reimbursed at the higher skilled nursing rate. This would have a gross annual Medicaid impact of $1,285,767. Our two major concerns with this appeal, however, are not with the increased cost per se, but whether it is programmatically necessary.

First, the conversion of 20 health related beds to skilled nursing beds is deemed necessary by the facility because the patients in these particular beds require skilled nursing care--not because the facility as a whole needs more skilled nursing beds. A review of this facility by New York City Regional Health Department nursing staff undertaken in response to this appeal focused only on these 20 patients, thus overlooking the possibility that some of the other 271 skilled nursing patients in the home could be adequately cared for at a HRF level. Statewide patterns show considerable patient misplacement in nursing homes and while this facility could be an exception, the Department did not document this. Regional Office staff did point out to us that a 100 percent Periodic Medical Review was performed last March in this facility, but the focus of this review, according to the staff, was on the quality of care, not the appropriateness of placement. In sum, we find no clear demonstration, either by the Department or the facility, that the bed conversion is necessary.

Second, the need for increasing the facility's skilled nursing bed capacity by 10 is not established in the appeal. In fact, we learned that the Bureau of Facility Planning in the Health Department--which has responsibility to review the need for additions in bed capacity--recommended disapproval in September of an application by Mary Manning to add 10 new SNF beds. (It is unclear to staff of that Bureau whether these are the same beds involved in the appeal.) This was done because there are currently more than 1,000 excess skilled nursing beds in Manhattan where Mary Manning is located. At the same time, there is a severe shortage of health related beds in that region. In view of these circumstances, it is difficult to understand why the Department through its reimbursement process would act to approve an appeal which adds more skilled nursing beds to the region and shrinks the supply of HRF beds while another part of the Department is working in exactly the opposite direction to correct severe bed supply imbalances.

Hebrew Home for the Aged/ Palisades Nursing Home

The operators of these facilities are seeking relief from ceiling penalties through this appeal by arguing that since the facilities are managed jointly and are physically contiguous, they should be grouped as a single facility of over 300 beds. (Separately, each has a capacity of under 300 beds.) This would remove virtually the entire ceiling penalty they are now subject to and would have a gross Medicaid impact of $3.2 million. Again, we have two major concerns which are programmatic in nature.

First, the operators are seeking relief from ceilings through a subtle change in the normal rate-making methodology when a direct method for obtaining relief is available within the existing methodology. Normally, each facility receives a separate rate which is largely determined by the ceilings for the group in which the facility is placed. The operators in this case are not asking for a composite rate but merely that for grouping purposes they be considered as a single facility. The higher resulting ceilings would then be applied to the separate rates of each facility, thus mitigating ceiling penalties.

The Department apparently agrees that this methodological change is justified in this particular case because of the "unique" physical connection of the facilities. Nothing, however, in the Department's supporting documentation speaks to the programmatic need of these facilities for relief from ceilings.

Part 86-2.14(7) of the Commissioner's Regulations states that in order to obtain relief from ceiling penalties "a residential health care facility must demonstrate that its range of approved services, patient mix, lengths of appropriate stays or other pertinent factors are direct causes for all or part of the costs in excess of the ceilings." Since these factors were not evident in the Department's consideration of the appeal, we find it difficult to approve the revised rate merely because the physical proximity of the facilities permits some sharing of services and joint management.

Second, the intent of allowing the side-by-side construction of the two facilities was to permit savings that might be achieved through shared services or joint management even though, by law, each is required to remain separate as evidenced by:

-- Separate operating certificates;

-- Separate boards of directors;

-- Separate bookkeeping and different calculations of capital and allocation of costs;

-- Separate physical plants (even though connected by a tunnel);

-- Separate ratings; and

-- Separate reimbursement rates.

The Department, to our knowledge, did not seek to determine where savings might be achieved because of the contiguous location of the facilities which opens "unique" opportunities for shared services. In fact, by approving the appeal as presented, it is agreeing to substantially higher levels of reimbursement in direct contradiction of these anticipated economies.

In view of the above, I am returning these appeals unapproved.

Sincerely,

Paul J. Elston

Paul J. Elston
Deputy Director

Enclosure

cc: P. C. Goldmark, Jr.

2049 Plaintiffs' Exhibit 21

ew York Association of Homes for the Aging

120 WEST 106TH STREET • NEW YORK, N.Y. 10025 • 212/666-2000

AFFILIATED WITH AAHA

December 30, 1976

OFFICERS
President
THOMAS F. COUGHLIN*
New York City
1st Vice President
REV. S. KENNETH ARNTSEN*
Clinton
2nd Vice President
REV. ROBERT M. ARMSTRONG
Buffalo
3rd Vice President
NORMAN E. HARPER
Syracuse
Secretary
SIDNEY FEINBERG
New Hyde Park
Treasurer
SISTER MARIE MICHELLE
Rochester
Immediate Past President
LAWRENCE E. LARSON*
New York City
Executive Vice President
MITCHELL M. WAIFE
New York City
DIRECTORS
MOTHER M. ALOYSIUS, O. CARM.
New York City
HAROLD O. MAWHINEY
Rye
WILLIAM McGRAIL
Clarence
ERNEST MOUNT
Rochester
LEON R. CANTOR
Buffalo
MRS. GLENN LITTLE
Binghamton
DR. ARTHUR HAGGERTY
Brooklyn
DR. JOSEPH W. BELL
Ossining
DAVID GLASER
New York City
SISTER ANGELA THERESA S.C.S.L.
Plattsburgh
WILLIAM J. GREENBERG
Rochester
ROBERT MACK
Syracuse
THEODORE ROSEN
Troy
ARTHUR SHADE
Williamsville
HONORARY MEMBER
MISS OLLIE RANDALL
New York City
AAHA HOUSE OF DELEGATES*
MSGR. CHARLES J. FAHEY
Syracuse
EDWARD E. MUNNS (at large)
Yonkers
JACOB REINGOLD
New York City

Dr. Frank Cicero, Deputy Commissioner
New York State Department of Health
Tower Building
Empire State Plaza
Albany, New York 12237

Dear Dr. Cicero:

We herewith submit a partial list of non-profit residential health care facilities which will suffer very serious financial losses as a result of the prospective implementation of the Medicaid reimbursement rates set forth in the attachment to Hospital Memorandum Series 76-116, dated 10/31/76, and whose financial positions will not be meaningfully improved under the proposed rates commencing January 1, 1977:

St. Cabrini Nursing Home, Inc.
Margaret Tietz Center for Nursing Care, Inc.
Mohawk Valley Nursing Home, Inc.
Daughters of Sarah Nursing Home Co., Inc.
Och Loretto Rest Nursing Home Co., Inc. w/o staffing
Mary Manning Walsh Nursing Home Co., Inc.
[illegible] Metropolitan Jewish Geriatric Center &
M.J.G. Nursing Home
Sephardic Home for the Aged
D: The Hebrew Home for the Aged at Riverdale
The Brookdale Hospital Center Nursing Home Co., Inc.
Beth Abraham Hospital

Lemberg

We hereby request that, in accordance with the assurances to Judge Griesa, appeals filed with the Department of Health by these residential health care facilities be processed and decided with all possible expedition.

A further list of those non-profit facilities requiring expedited treatment of their appeals will be submitted shortly.

Sincerely,

Lloyd T. Nurick

Lloyd T. Nurick
Executive Director

LTN/gl
cc: Hon. Thomas Griesa
U.S. District Judge

The statewide membership organization of non-profit homes for older people.

2050

155

Plaintiffs' Exhibit 22

New York Association of Homes for the Aging
Suite 104, 111 Washington Avenue, Albany, N. Y. 12210 · 518/449-2707

AFFILIATED WITH

OFFICERS
President
NORMAN HARPER*
Syracuse
1st Vice President
SISTER MARIE MICHELLE
Rochester
2nd Vice President
REV. ROBERT M. ARMSTRONG
Buffalo
3rd Vice President
MITCHELL WAIFE
New York City
Secretary
SIDNEY FEINBERG
New Hyde Park
Treasurer
THEODORE ROSEN
Albany
Immediate Past President
THOMAS F. COUGHLIN*
New York City
Executive Director
LLOYD T. NURICK
Albany

DIRECTORS
1977
DR. JOSEPH W. BELL
Ossining
DAVID GLASER
New York City
ARTHUR HAGGERTY
ooklyn
MRS. GLENN LITTLE
Binghamton
SISTER ANGELA THERESA S.C.S.L.
Plattsburgh
1978
WILLIAM J. GREENBERG
Rochester
ROBERT MACK
Syracuse
ARTHUR E. SHADE, III
Williamsville
RONALD B. STUCKEY
New York City
1979
SISTER ARMAND MARIAN, O. CARM.
New York City
LEON R. CANTOR
Buffalo
HAROLD O. MAWHINEY
Rye
WILLIAM J. McGRAIL
Clarence
ERNEST G. MOU
Rochester

HONORARY MEMBER
MISS OLLIE RANDALL
New York City

*AAHA HOUSE OF DELEGATES
REV. S. KENNETH ARNTSEN
Clinton
MSGR. CHARLES J. FAHEY (President)
Syracuse
LAWRENCE E. LARSON
York City
WARD E. MUNNS (at large)
Yonkers
JACOB REINGOLD
New York City

January 3, 1977

Dr. Frank Cicero, Deputy Commissioner
New York State Department of Health
Tower Building
Empire State Plaza
Albany, New York 12237

Dear Dr. Cicero:

In accord with my letter of December 30, 1976, I am submitting a second group of non-profit residential health care facilities which require expedited treatment of their appeals. In the haste to provide you with the initial list, the Home for Aged Blind was inadvertently excluded. I would appreciate it if you would add that home to the group we submitted earlier.

Non-profit residential health care facilities requiring expedited appeals treatment:

Holy Family Home for the Aged
Haym Salomon Home for the Aged
United Odd Fellows and Rebekah Home
House of the Holy Comfortor
Workmen's Circle Home & Infirmary for the Aged
Daughters of Jacob Geriatric Center
The Wartburg Home
Samaritan-Keep Nursing Home, Inc.
Mercy Health & Rehabilitation Center
St. Ann's Home
Carmel Richmond Nursing Home, Inc.
Jamaica Hospital & Nursing Home
Rosa Coplon Jewish Home & Infirmary
Teresian House Nursing Home Co., Inc.
Plaza Nursing Home

I expect to provide you, on Friday of this week, with a prioritized list of the remaining homes with known reductions.

Sincerely,

Lloyd T. Nurick

Lloyd T. Nurick
Executive Director

LTN/gl

cc: Judge Thomas Griesa

The statewide membership organization of non-profit homes for older people

New York Association of Homes for the Aging
Suite 104, 111 Washington Avenue, Albany, N. Y. 12210 · 518/449-2707

AFFILIATED WITH
AAHA

2051

OFFICERS
President
NORMAN HARPER*
Syracuse
1st Vice President
SISTER MARIE MICHELLE
Rochester
2nd Vice President
REV. ROBERT M. ARMSTRONG
Buffalo
3rd Vice President
MITCHELL WAIFE
New York City
Secretary
SIDNEY FEINBERG
New Hyde Park
Treasurer
THEODORE ROSEN
Albany
Immediate Past President
THOMAS F. COUGHLIN*
New York City
Executive Director
LLOYD T. NURICK
Albany
DIRECTORS
1977
DR. JOSEPH W. BELL
Corning
DAVID GLASER
New York City
R. ARTHUR HAGGERTY
ocklyn
RS. GLENN LITTLE
Binghamton
SISTER ANGELA THERESA S.C.S.L.
Plattsburgh
1978
WILLIAM J. GREENBERG
Rochester
ROBERT MACK
Syracuse
ARTHUR E. SHADE, III
Williamsville
RONALD B. STUCKEY
New York City
1979
SISTER ARMAND MARIAN, O. CARM.
New York City
LEON R. CANTOR
Buffalo
HAROLD O. MAWHINEY
Rye
WILLIAM J. McGRAIL
Clarence
ERNEST G. MOUNT
Rochester
HONORARY MEMBER
MISS OLLIE RANDALL
New York City
*AAHA HOUSE OF DELEGATES
REV. S. KENNETH ARNTSEN
Clinton
MSGR. CHARLES J. FAHEY (President)
Syracuse
LAWRENCE E. LARSON
New York City
WARD E. MUNNS (at large)
kers
JACOB REINGOLD
New York City

January 7, 1977

Plaintiffs' Exhibit 23

Dr. Frank Cicero, Deputy Commissioner
New York State Department of Health
Tower Building
Empire State Plaza
Albany, New York 12237

Dear Dr. Cicero:

This is the third and final list of non-profit residential health care facilities which require expedited treatment of their appeals.

The following homes are in priority order. Thus, the first home on the list should receive consideration before the subsequent homes and so on.

St. Mary's Hospital for Children
Jennie B. Richmond Chaffee Nursing Home
United Home for Aged Hebrews
Brooklyn Methodist Church Home
Tioga Nursing Home
New York Congregational Home
Ozanam Hall of Queens Nursing Home
Fort Hudson Nursing Home
Baptist Home of Brooklyn
Rhode Island Street Nursing Home Co.
Bezalel Nursing Home Co.
Reconstruction Home
Grand Lodge 1001 Home and Orphanage
Lutheran Retirement Home
Providence Rest Home for the Aged
Menorah Home and Hospital
Presbyterian Homes of Western New York
Roscoe Community Nursing Home
Martin Luther Nursing Home
Metropolitan Jewish Geriatric Center and M.J.G. Nursing Home
Home of the Sages of Israel
United Nursing Home for Aged
St. Luke's Manor
St. Johnland Nursing Home

The statewide membership organization of non-profit homes for older people

Adventist Nursing Home
Chase Memorial Nursing Home
Bialystoker Home for the Aged
Newfane Health Related Facility
St. Luke's Nursing Home
Tolstoy Foundation Nursing Home
St. Camillus Nursing Home
Hebrew Hospital for Chronic Sick
Geneva General Hospital Nursing Home
United Home for Aged Hebrews
Jewish Home and Hospital for the Aged
Wartburg Lutheran Home for the Aging
Wheel Chair Home
Thompson Nursing Home
Eastern Star Home and Infirmary
Howe Avenue Nursing Home
Methodist Church Home for the Aged
Charles T. Sitrin Home
Bethel Methodist Home
H.R.F. of Rome
Brothers of Mercy Nursing Home
Jewish Home and Infirmary
Presbyterian Home of Central New York
St. Patrick's Home for the Aged
Norwegian Christian Home and Health Center
Lakeshore Nursing Home
Uihlein Mercy Center
Morningside House Nursing Home
Chapin Home for the Aged
Good Samaritan Nursing Home
Shalom Nursing Home
Peninsula General Nursing Home
Ferncliff Nursing Home
Wells Nursing Home
St. Joseph's Nursing Home Co. of Utica

We have acquired additional information which requires reordering of the status of two homes. The Concord Nursing Home should be placed on the list of top priority items included in my December 30th letter to you. The Metropolitan Jewish Geriatric Center and M.J.G. Nursing Home, which was included in the December 30th letter, should be removed from that list. You will find it included in the above listing of homes in the order in which it should be considered.

I am also informed by Estelle Wall of your staff that Lemberg Home and Geriatric Institute has been moved by departmental determination to the highest priority list. We raise no objection to this action on your part and in recognition of your action we have not included Lemberg on any of our lists.

Sincerely,

Lloyd T. Nurick

Lloyd T. Nurick
Executive Director

LTN/gl
cc: Hon. Thomas Griesa

2053

Plaintiffs' Exhibit 24

New York Association of Homes for the Aging
Suite 104, 111 Washington Avenue, Albany, N. Y. 12210 · 518/449-2707

AFFILIATED WITH

OFFICERS
President
NORMAN HARPER*
Syracuse
1st Vice President
SISTER MARIE MICHELLE
Rochester
2nd Vice President
REV. ROBERT M. ARMSTRONG
Buffalo
3rd Vice President
MITCHELL WAIFE
New York City
Secretary
SIDNEY FEINBERG
New Hyde Park
Treasurer
THEODORE ROSEN
Albany
Immediate Past President
THOMAS F. COUGHLIN*
New York City
Executive Director
LLOYD T. NURICK
Albany

DIRECTORS
1977
DR. JOSEPH W. BELL
Ossining
DAVID GLASER
New York City
DR. ARTHUR HAGGERTY
ooklyn
RS. GLENN LITTLE
Binghamton
SISTER ANGELA THERESA S.C.S.L.
Plattsburgh
1978
WILLIAM J. GREENBERG
Rochester
ROBERT MACK
Syracuse
ARTHUR E. SHADE, III
Williamsville
RONALD B. STUCKEY
New York City
1979
SISTER ARMAND MARIAN, O. CARM.
New York City
LEON R. CANTOR
Buffalo
HAROLD O. MAWHINEY
Rye
WILLIAM J. McGRAIL
Clarence
ERNEST G. MOUNT
Rochester

HONORARY MEMBER
MISS OLLIE RANDALL
New York City

*AAHA HOUSE OF DELEGATES
REV. S. KENNETH ARNTSEN
Clinton
MSGR. CHARLES J. FAHEY (President)
Syracuse
LAWRENCE E. LARSON
New York City
WARD E. MUNNS (at large)
kers
JACOB REINGOLD
New York City

January 25, 1977

Dr. Frank Cicero, Deputy Commissioner
New York State Department of Health
Tower Building
Empire State Plaza
Albany, New York 12237

Dear Dr. Cicero:

We have been informed by the Hospital Association of New York State that a number of hospital based skilled nursing facilities were excluded from the list of non-profit nursing homes this association has submitted to you for expedited consideration of their appeals. I am therefore submitting a revised listing to replace the list submitted on January 7. As in that letter, the following are in priority order.

E.J. Noble Hospital of Alexandria
Schuyler Hospital
Cuba Memorial Hospital
Tri-County Memorial Hospital
Arnold Gregory Memorial Hospital
Margaretville Memorial Hospital
Oneida City Hospital
Soldiers & Sailors Memorial Hospital
Arnot Ogden Hospital
St. Mary's Hospital for Children
St. Luke's Memorial Hospital Center
Jennie B. Richmond Chaffee Nursing Home
United Home for Aged Hebrews
Clifton Springs Hospital & Clinic
Brooklyn Methodist Church Home
Tioga Nursing Home
New York Congregational Home
Community Hospital - Delaware County
Ozanam Hall of Queens Nursing Home
Genesee Hospital
Fort Hudson Nursing Home
Baptist Home of Brooklyn
Rhode Island Street Nursing Home Co.
Bezalel Nursing Home Co.
Reconstruction Home

The statewide membership organization of non-profit homes for older people

Grand Lodge 1001 Home and Orphanage
Lutheran Retirement Home
Providence Rest Home for the Aged
Menorah Home and Hospital
Presbyterian Homes of Western New York
Roscoe Community Nursing Home
Martin Luther Nursing Home
Metropolitan Jewish Geriatric Center and M.J.G. Nursing Home
Home of the Sages of Israel
United Nursing Home for Aged
St. Luke's Manor
St. Johnland Nursing Hoem
Adventist Nursing Home
Chase Memorial Nursing Home
Bialystoker Home for the Aged
Newfane Health Related Facility
St. Luke's Nursing Home
Tolstoy Foundation Nursing Home
St. Camillus Nursing Home
Hebrew Hospital for Chronic Sick
Geneva General Hospital Nursing Home
Jewish Home and Hospital for Aged
Wartburg Lutheran Home for the Aging
Wheel Chair Home
Thompson Nursing Home
Eastern Star Home and Infirmary
Howe Avenue Nursing Home
Methodist Church Home for the Aged
Charles T. Sitrin Home
Bethel Methodist Home
H.R.F. of Rome
Brothers of Mercy Nursing Home
Jewish Home and Infirmary
Presbyterian Home of Central New York
St. Patrick's Home for the Aged
Norwegian Christian Home and Health Center
Lakeshore Nursing Home
Uihlein Mercy Center
Morningside House Nursing Home
Chapin Home for the Aged
Good Samaritan Nursing Home
Shalom Nursing Home
Peninsula General Nursing Home
Ferncliff Nursing Home
Wells Nursing Home
St. Joseph's Nursing Home Co. of Utica

Sincerely,

Lloyd T. Nurick
Executive Director

LTN/gl
cc: Hon. Thomas Griesa   Michael Pulling

2055

Plaintiffs' Exhibit 25

New York Association of Homes for the Aging
Suite 104, 111 Washington Avenue, Albany, N. Y. 12210 · 518/449-2707

AFFILIATED WITH
AAHA

OFFICERS
President
NORMAN HARPER*
Syracuse
1st Vice President
SISTER MARIE MICHELLE
Rochester
2nd Vice President
REV. ROBERT M. ARMSTRONG
Buffalo
3rd Vice President
MITCHELL WAIFE
New York City
Secretary
SIDNEY FEINBERG
New Hyde Park
Treasurer
THEODORE ROSEN
Albany
Immediate Past President
THOMAS F. COUGHLIN*
New York City
Executive Director
LLOYD T. NURICK
Albany

DIRECTORS
1977
DR. JOSEPH W. BELL
Ossining
DAVID GLASER
New York City
R. ARTHUR HAGGERTY
Brooklyn
MRS. GLENN LITTLE
Binghamton
SISTER ANGELA THERESA S.C.S.L.
Plattsburgh
1978
WILLIAM J. GREENBERG
Rochester
ROBERT MACK
Syracuse
ARTHUR E. SHADE, III
Williamsville
RONALD B. STUCKEY
New York City
1979
SISTER ARMAND MARIAN, O. CARM.
New York City
LEON R. CANTOR
Buffalo
HAROLD O. MAWHINEY
Rye
WILLIAM J. McGRAIL
Clarence
ERNEST G. MOUNT
Rochester

HONORARY MEMBER
MISS OLLIE RANDALL
New York City

*AAHA HOUSE OF DELEGATES
REV. S. KENNETH ARNTSEN
Clinton
MSGR. CHARLES J. FAHEY (President)
Syracuse
AWRENCE E. LARSON
w York City
DWARD E. MUNNS (at large)
Yonkers
JACOB REINGOLD
New York City

January 25, 1977

Dr. Frank Cicero, Deputy Commissioner
New York State Department of Health
Tower Building
Empire State Plaza
Albany, New York 12237

Dear Dr. Cicero:

In my letter of January 3, a list of homes for expedited consideration of appeals was submitted. It included St. Ann's Home.

At the request of that home, we ask that you withdraw it from the list and not consider St. Ann's as part of the groups we have sent you.

Sincerely,

Lloyd T. Nurick

Lloyd T. Nurick
Executive Director

LTN/gl
cc: Sister Marie Michelle Peartree
Hon. Thomas Griesa
David Stern
Mitchell Waife

DEFENDANTS' EXHIBIT AA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---X
NEW YORK ASSOCIATION OF HOMES FOR
AGING, INC., et.al., on behalf of :
themselves and all other nonprofit
residential health care facilities :
which render services to Medicaid
sponsored patients, :

Plaintiffs, :

-against- :

PHILIP L. TOIA, as Commissioner of :
Social Services of the State of New York,
ROBERT P. WHALEN, as Commissioner of :
Health of the State of New York,
PETER GOLDMARK, as Director of the :
Budget of the State of New York, and
HUGH L. CAREY, as Governor of the :
State of New York,
:
Defendants.
---X

Pursuant to the instructions of the Court, staff of the New York State Department of Health met with representatives of Mohawk Valley Nursing Home, Inc. (hereinafter "the facility") on December 14, 1976. In the course of such meeting the Department's staff advised the representatives of the Facility of its position with regard to proposed cuts in the operational expenses of the facility, and such representatives advised the Department's staff of their views. Following are a Findings of Fact and a summary of the respective views:

BEST COPY AVAILABLE

FINDINGS OF FACT **Facility:** MOHAWK VALLEY NURSING HOME, INC.

Reported 1976 Annualized Costs	$2,375,141
Income at Correct 366 Days	1,886,803
Difference	$ 488,338

Cost Savings in 1976 Dollars - Potential

Nursing Personnel	$238,910
Nursing Overtime	20,000
Administration & General	166,755
Meals at a Loss	20,000
Less Depreciation*	135,208
Nonoperating Income	48,374
Total Projected Savings	$629,247

Positive Cash Flow: $140,909

Summary

1. Loss claimed by facility	$488,338
2. Total reductions proposed by Department	629,247
3. Total Dollar reductions accepted by facility	186,755
4. Items of disagreement (Nursing Personnel, Meals at Loss Depreciation and nonoperating income)	442,492

(*) Not an actual cash expenditure.

FINDINGS OF FACT

Nursing Service Staffing

1. A patient nursing care needs assessment was made by the Department based upon information and documentation supplied by the facility for the period October 12-14, 1976. This assessment showed an average need of 3.18 hours per patient per day.

2. The figure for current nursing service staffing provided by this facility was based upon information and documents supplied by the facility. The figures showed that an average of 4.25 hours per patient per day is provided.

3. Reduction in staffing to that required by the patient needs assessment could result in potential savings of approximately $238,910 per year.

4. The facility neither agreed nor disagreed with the proposed reduction in nursing services staff and offered no rebuttal to the Department findings of overstaffing based upon the assessment of needs for the period October 12-14, 1976. The facility stated that it required additional time to evaluate the issue of patient needs and conduct a four week study.

Nursing Service Overtime

5. Reduction in nursing services overtime could produce a potential savings of up to $20,000 per year. The facility is currently implementing a program to reduce nursing services overtime to effect such savings.

Cost Allocation of Administration and General Services Between The Hospital and the Nursing Home

6. The 1974 Uniform Financial Report Step Down which is utilized in computing the 1976 Medicaid rate allocates 44% of the general and administration overhead expense to the nursing home in this hospital-based facility. This allocation has been revised by the facility's accountants for 1975. The attorney's for the facility have indicated to the court that their estimate of costs should be based upon an allocation of 20% to the nursing home. Any proposed reallocation of 1974 costs between the nursing home and the hospital must be presented for approval to Blue Cross (Utica) as the hospital's fiscal intermediary. The potential cost reduction to the nursing home is $166,755 per year.

Discount Meals

7. The facility provides meals to staff, volunteers and visitors at a loss. Providing meals on a cost basis could result in a revenue increase of up to $20,000 per year.

New York State D. of H.		Mohawk Valley Nursing Home
Operational Category	Comments	Comments
Nursing Services Staffing	Department states facility is over-staffed by over one-hour per patient per day. Reduction in nursing staff by 20 positions could save approximately $238,910 per year. Department analysis of data submitted by the facility indicates patient needs assessment for 3.18 hours per patient per day required. Facility is currently providing 4.25 hours per patient per day.	Does not accept validity of patient need assessment as data is based on a limited time period. Facility proposes to conduct their own study over a four week period to analyze patient needs.
Nursing Service Overtime	Reduction in paid overtime could result in potential	Agrees. Has instituted reductions in paid overtime.

New York State D. of H.		Mohawk Valley Nursing Home In
Operational Category	Comments	Comments
Nursing Service Overtime (Cont'd.)	savings of approximately $20,000 per year.	
Cost Allocations of Administration and General Services Between the Hospital and the Nursing Home	1974 Uniform Financial Report Step Down allocates 44% of the total cost as an expense of the nursing home. The accountants for the facility as of 1975 have made a different allocation. Potential savings of $166,755 could be realized by an allocation of 20% to the nursing home for 1974 costs.	Agrees. Has advised the court that its operating costs should be based on an allocation of 20% of the cost to the nursing home. Proposed reallocation of costs must be submitted for approval to Blue Cross (Utica) as the hospital's fiscal intermediary.

New York State D. of H.		Mohawk Valley Nursing Home
Operational Category	Comments	Comments
Discount Meals	The facility provides meals to staff, volunteers, and visitors at a loss. Providing meals on a cost basis could result in a revenue increase of up to $20,000 per year for the nursing home. This would shift the cost of employee meals from the patient to the employee.	Outside eating facilities not readily available and facility desires that employees eat on premises. Any cost savings would have to be allocated between the nursing home and the hospital. Providing such meals at a loss is routine procedure.

2063

WORKSHEETS

12/14/76 Meeting

FACILITY: MOHAWK VALLEY NURSING HOME

IN ATTENDANCE

DEPARTMENT STAFF

Eugene Laks, Central Enforcement Unit
Steve Finch, Reimbursement & Rate Setting
Stella Sapharas, Syracuse Regional Office
Lawrence Spooner, Syracuse Regional Office
Irving Feldman, Health Facility Planning
Larry Clark, Syracuse Regional Office
Philip DeFreest, Medicare Program Coordination

FACILITY REPRESENTATIVES

Jeffrey Mishkin, Proskauer, Rose, Goetz & Mendelsohn
Michael O. Pulling, HANYS
George Clive, Mohawk Valley
Marjorie Dolch, Mohawk Valley
Howard E. Collin, Mohawk Valley

Facility: Mohawk Valley Nursing Home

NURSING ADMINISTRATION,

12/14/76

$ REGISTERED NURSES, AIDES, AND ATTENDANTS

2064

$238,910

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name Ms. Sapharas)

Based on patient need information documented by the facility and reviewed during an October 12-14, 1976 survey, facility's patients have need for an average of 3.18 nursing hours, per patient, per day. The three units of the facility furnish nursing services in the range of 3.56 to 4.68 hours, per day, an average of 4.25 hours. Nursing hours can be reduced by an average from current staffing levels by one hour, per day per patient without adversely affecting patient care.

The facility would still have the potential to be rated "Good State" in this category.

Documentation

continued...

FACILITY POSITION

JUSTIFICATION

Testimony (name Mr. Collins)

Facility questioned validity of data as it was based on one time frame. Facility proposed to conduct their own study of needs over a four week period, by shift. Facility claims a unique patient mix and insists the matter needs further study and evaluation, before they could implement cuts.

The facility is non-union.

Documentation

UNRESOLVED ISSUES

The facility neither accepted nor rejected the need for nursing staff reductions. They state that additional evaluation is necessary by the facility before any final decisions can be made.

COMMENTS

1974 data was utilized to compute cost savings as 1974 is the base year for computing 1976 rates under the Medicaid formula. The Department projection factor to project 1974 data to 1976 levels is 17.16% which reflects economic movement for the two year period. 1974 cost savings of $203,918 of nursing service staffing is projected to 1976 by the projection factor of 17.16% for a total projected savings of approximately $238,910.

RECISTERED NURSES, AIDES, AND ATTENDANTS

12/14/76

$ ____________________

DEPARTMENT CUT RECOMMENDATION

Justification

Testimony (Name Ms. Sapharas (cont'd))

The specific recommendation is to eliminate twenty direct care nursing personnel. This is regarded as a conservative estimate.

The methods used to evaluate nursing needs and care are the same used in all such facilities within the Syracuse Region. The evaluation was done in conjunction with a periodic medical review (PMR) conducted during the same time period, which supported the nursing need data collected by the facility.

Testimony (Name Mr. Finch)

Reviewed Uniform Financial Report (UFR) stepdown with the facility and described the methodology leading to the Department's conclusion that the reduction in hours of care to 3.18 could result in a potential savings of $203,918 in 1974 costs.

Nursing Service Health and Welfare Benefits	$122,857
Nursing Direct Salary	686,984
Total Fringes & Salary	$809,841

3.18: x :: 4.25: $809,844
x = $605,923
$809,841 minus $605,923 = $203,918

The estimated savings do not include any costs that would be incurred in terminating personnel.

Testimony (Name Mr. Spooner)

The problem described in January of 1976, was one of allocating existing staff resources, not one demonstrating a need for additional staff.

The estimate of need for 3.18 care hours includes provision for normal administrative overhead of employees.

continued...

FACILITY POSITION

Justification

Testimony (Name ____________________)

Testimony (Name Mr. Mishkin)

Question raised as to whether estimated savings included costs of terminating personnel. Estimates seemingly based on averages; if all cuts were made at the Aide level, the savings would be less.

Testimony (Name Mr. Dolch)

The facility was advised in January, 1976 of a shortage of licensed nurses.

If nursing hours are cut, where does the time come from for inservic education and other administrative functions?

URSING ADMINISTRATION,

EGISTERED NURSES, AIDES, AND ATTENDANTS

FACILITY: MOHAWK VALLEY NURSING HOME

12/14/76

PARTMENT CUT RECOMMENDATIONS	FACILITY POSITION
stification	**Justification**
stimony (Name Mr. Laks and Mr. Spooner)	**Testimony** (Name Mr. Mishkin)
At this time, the Department has no specific plan as to which specific positions should be liminated to implement these reductions. The acility was advised that they are in a posiion to draft such a plan, as discussed with hem in a conference at the Syracuse egional Office on December 10. The plan will e left to their discretion in the first nstance, rather than the Department manating a specific plan. There are several ays these reductions could be accomplished. he Department will assist in any way ossible.	Does the Department have a plan for how these cuts should be implemented?
estimony (Name Mr. Spooner)	Testimony (Name Mr. Mishkin)
Specific recommendations for reductions were ot previously given.	Were any specific staff reductions recommended prior to initiation of the current lawsuit?
estimony (Name Mr. Finch)	
he facility has always been expected to perate within existing ceilings.	
estimony (Name Mr. Laks)	Testimony (Name Mr. Mishkin)
The report was prepared under the direction f Mr. James Tunny, Director of the Bureau of eriatrics and Long Term Care, with assistance rom Mr. Spooner, Dr. Furth and the Division f Health Economics. It was based upon input rom survey staff of the Syracuse Regional ffice.	Who prepared the report?

continued....

NURSING ADMINISTRATION,

REGISTERED NURSES, AIDES, AND ATTENDANTS

$\$$ ______________

FACILITY: MOHAWK VALLEY NURSING HOME

2067 12/14/76

DEPARTMENT CUT RECOMMENDATIONS	FACILITY POSITION
Justification	Justification
Testimony (Name Mr. Spooner)	Testimony (Name Mr. Collins, Ms. Dolch)
These needs can be met by reassigning current staff resources. There is no need to escalate costs. The net need is for an additional one to two days per week and any increase (if any) would be limited to the cost differential for this period.	The facility needs a full-time Director of Nursing and a full-time assistant. Will these additional costs be allowed?
Testimony (Name Mr. Laks)	Testimony (Name Mr. Mishkin)
This information is not at hand; we will find out and get this information to him.	Were hospital based Nursing Homes included in the cost ceilings?

NURSING ADMINISTRATION,

12/14/76

2068

REGISTERED NURSES, AIDES, AND ATTENDANTS

$ $20,000

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name Ms. Sapharas)

Facility has, from June to September, 1976 incurred 1,000 hours in paid overtime, which could be eliminated. On an annual basis, this projects to approximately 4,000 hours, at $5 per overtime hour for an estimated projected 1976 savings of $20,000.

Documentation

SUBT

FACILITY POSITION

JUSTIFICATION

Testimony (name Ms. Dolch)

This has, generally, been eliminated.

Documentation

UNRESOLVED ISSUES

None.

COMMENTS

Facility: ____________

ADMINISTRATION AND GENERAL

12/14/76 2069

$ 166,755

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name Mr. Finch)

Present allocation of Administrative and General (A&G) expenditures between the hospital and nursing home call for the nursing home to bear 44% of the total cost of these combined operations. The facility's accounting firm (Price-Waterhouse) has implemented more sophisticated cost finding techniques which would more realistically reflect operations and reduce the nursing home share. 1974 allocation savings of $142,331.

Documentation

FACILITY POSITION

JUSTIFICATION

Testimony (name Mr. Mishkin)

The court has been advised that 20% of the costs should be allocated to the nursing home as recommended by their accounting firm.

Documentation

UNRESOLVED ISSUES

Any reallocation of costs must be approved by the facility's fiscal intermediary, Blue Cross of Utica, New York.

COMMENTS

1974 dollar cost savings of $142,331 is projected to 1976 by projection factor of 17.16% for a total projected savings of approximately $166,755.

ADMINISTRATION AND GENERAL

12/14/76 2070

$ 20,000

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name Mr. Finch)

A review of the UFR stepdown reveals that the facility is providing meals to staff, volunteers and guests at a loss. Potential revenue from charging cost for these meals approximates $20,000 a year projected to 1976.

Testimony (Name Mr. Spooner)

This change will provide additional revenue over the next two years.

Documentation

FACILITY POSITION

JUSTIFICATION

Testimony (name Mr.Collins)

There are no eating facilities in the immediate area. The employees are allowed only ½ hour for lunch. They prefer for employees not to leave the premises, due to emergencies and other reasons. Common practice in the area is to provide these meals to employees at raw food cost, plus 10%.

In the long run, no savings would be realized for the facility. The cost would be shifted from the per diem to the employees.

The cost reduction for the nursing home, if implemented, would be only 1/3 of the total indicated.

Documentation

UNRESOLVED ISSUES

Will the facility transfer the cost of employee meals from the patients to the employees?

COMMENTS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS' EXHIBIT BB

---X
NEW YORK ASSOCIATION OF HOMES FOR :
AGING, INC., et.al., on behalf of :
themselves and all other nonprofit
residential health care facilities :
which render services to Medicaid
sponsored patients, :

Plaintiffs, :

-against- :

PHILIP L. TOIA, as Commissioner of :
Social Services of the State of New York,
ROBERT P. WHALEN, as Commissioner of :
Health of the State of New York,
PETER GOLDMARK, as Director of the :
Budget of the State of New York, and
HUGH L. CAREY, as Governor of the :
State of New York,
:
Defendants.
---X

Pursuant to the instructions of the Court, staff of the New York State Department of Health met with representatives of Margaret Tietz Nursing Home (hereinafter "the facility") on December 14, 1976. In the course of such meeting the Department's staff advised the representatives of the Facility of its position with regard to proposed cuts in the operational expenses of the facility, and such representatives advised the Department's staff of their views. Following are a Findings of Fact and a summary of the respective views:

Margaret Tietz

Findings of Fact

Based on Departmental recommendations of budget reductions, this facility could provide satisfactory care to its patients and retain its Good-State rating while at the same time effecting tremendous savings.

Total reductions recommended by the Department amounting to $756,602 could be accomplished. The facility's operating expenses should also be reduced by depreciation in the amount of $211,465. In addition, the operating loss computed by using the Medicaid rate for all patients should be adjusted to reflect private paying patients in the amount of $223,155.

The net effect of these reductions and adjustments would be a total reduction of $1,191,222.

Summary

1. Loss claimed by facility	$1,170,907
2. Total reductions proposed by Department	1,191,222
3. Total dollar reductions accepted by facility	questionable (facility agreed in principle with some cuts, but without providing cost data or specifics)
4. Items of disagreement	questionable (facility did not agree, but no cost data provided)

Attachment: Worksheets

	New York State Department of Health	Margaret Tietz Nursing Home
Operational Category	Comments	Comments
Administration	1. Total reduction $109,864 2. Eliminate 6½ positions 3. Reduce salaries of Administrator and comptroller by 10% 4. Reduce non-salary expenses 5. Functions of eliminated positions to be absorbed by remaining staff	Agreed with ½ bookkeeping position reduction and elimination of Director of Volunteers and certain other non-salary reductions. Disagreed with remaining reductions.
Nursing	1. Total reduction $394,645. 2. Eliminate 31 nursing positions 3. Reduce salary of Director of Nursing Services 4. Reduce non-salary expenses from $1.18 to $.98 in SNF and from $1.11 to $.50 in HRF.	Disagreed with reductions because of level of care needed by patients.

	New York State Department of Health	Margaret Tietz Nursing Home
Operational Category	Comments	Comments
Food and Nutrition	Total reduction $110,843. Eliminate four positions; reduce food costs per patient day by $.50. Reduce non-food costs by $.40 per patient day.	Facility agreed to eliminate three positions. Facility will try to make reductions in non-salary expenses. Disagreed to eliminate fourth position.
Housekeeping	1. Total reduction $91,368 2. Abolish three housekeeping aides 3. Abolish three laundry aides 4. Laundry aide functions to be absolutely housekeeping aides 5. Convert one housekeeping aide to Central Supply Technician	Disagreed with all reductions.
Social Service	1. Total reduction $25,902 2. Abolish one MSW 3. Reduce other MSW position to BSW 4. No special patient needs	Facility feels patients have special needs and disagreed with all reductions.
Leisure Time Activities	1. Total reduction $23,980 2. Reduce activity hours from 152 to 95 per week	Facility willing to cut 12 hours per week

WORKSHEETS

12/14/76 Meeting

Facility Margaret Tietz Center for Nursing Care

IN ATTENDANCE

DEPARTMENT STAFF

Ed Fischer

Edrie M. Cohen

Dr. N. Michelin

William Carmello

J. Jasinski

H. Henkin

Sheri Samuels

Madeline Penachio

Tom Finnen

Tony Trimarchi

Anne Lee

Lillian Kaplan

Enid McCoy

FACILITY REPRESENTATIVE

Bryan Mesh

David Glaser

Emily Kass

Keith Kinnally (HANYS)

ADMINISTRATION AND GENERAL

$ 109,864

Facility: Margaret Tietz

12/14/76

DEPARTMENT CUT RECOMMENDATIONS	FACILITY POSITION
Testimony (Dr. Michelen)	Testimony (David Glaser)
Justification	Justification
1. Abolish positions of Director of Personnel, Admitting Officer and Associate Administrator.	1. The Director of Personnel, Admitting Officer and Associate Administrator have other responsibilities and do good jobs which should justify their retention.
2. 10% Reduction of the salaries of the Administrator and Comptroller.	2. The 10% reduction in salaries of Administrator and Comptroller is uncalled for. Both took only the minimum increase in salary this year, but it is justified by their talents.
3. Reduction of bookkeepers to 1½ positions.	3. Reducing bookkeepers to 1½ positions is impossible. The 3 bookkeepers have all that they can handle even now, especially in view of the new requirement for patient fund accounts. They could agree to only a reduction of ½.
4. Abolition of position of Director of Volunteers.	4. Facility agreed to abolish Director of Volunteers position.
5. Abolition of one secretarial position.	5. It would be impossible to effectuate the reduction because it would leave only two secretaries.
Documentation	Documentation
The administrative costs and staff reduction recommendation is based on a comparison of this facility with other similar sized facilities in New York City. This analysis reveals that the salaries of the three administrators of this facility are at least 10% over the normal. In other areas of administrative costs, comparisons to other facilities indicate that the facility is over-staffed in general administrative positions.	Based on witness' expertise as administrator.

UNRESOLVED ISSUES

Facility refused to accept any of the Department recommendations except for (a) elimination of the Director of Volunteers; (b) reducing by ½ bookkeeper instead of the Department recommendation to reduce by 1½.

NURSING ADMINISTRATION,

12/14/76

2077

$ REGISTERED NURSES, AIDES, AND ATTENDANTS

$394,645

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name Ms. Kaplan)

1. Reduce RNs, LPNs and Aides to 18 on day shift, 13 on evening and 10 on night shift in SNF.

2. Reduce RNs, LPNs, and Aides to 5 on day shift and 4 on evening and 4 on night shift in HRF.

3. Eliminate the Associate Director of Nursing Services.

Documentation

[illegible]

FACILITY POSITION

JUSTIFICATION

Testimony (name Mr. Glaser and Ms. Kass)

1. The cuts in RNs, LPNs and Aides are totally unacceptable because they will be unable to maintain the present level of care at 2.9 hours especially in view of the type of patient being dealt with.

2. The unit service manage and central supply technicians are essential to free nurses for other duties.

3. Reduction in secretarial help and ward clerks is impossible.

Documentation

UNRESOLVED ISSUES

COMMENTS

NURSING ADMINISTRATION,

$ REGISTERED NURSES, AIDES, AND ATTENDANTS

12/14/76

2073

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name Ms. Kaplan)
continued

Eliminate 1.34 nursing supervisor.

Eliminate unit service manager

Retain central supply technician but eliminate one extra housekeeper aide.

7. Reduce 3/4 secretary to 1/2.

Reduce 2.1 ward clerks to 1.5.

Reduce salary of Director of Nursing Services from $26,500 to $21,000

Documentation

ased on witnesses' expertise and experience.

FACILITY POSITION

JUSTIFICATION

Testimony (name Mr. Glaser and Ms. Kass)
continued

4. Salary reduction for the Director of Nursing Service is unrealistic.

Documentation

Based on witnesses' expertise and experience as administrator and director of nursing services.

UNRESOLVED ISSUES

Facility refused to accept the Department's recommendations and refused to accept methodology that a nurses work time was 7 hours per day as opposed to their methodology of 6.75 hours.

COMMENTS

NURSING ADMINISTRATION,

12/14/76

$ REGISTERED NURSES, AIDES, AND ATTENDANTS 2079

$394,645

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name Mr. Fennen)

1. Reduce non-salary items in SNF from $1.18 to 98¢ and in HRF from $1.11 to 50¢.

Documentation

Based on comparison with similarly sized facilities.

FACILITY POSITION

JUSTIFICATION

Testimony (name Mr. Mesh)

1. Facility will attempt to make these reductions.

Documentation

UNRESOLVED ISSUES

Facility unsure if they will be able to make the reductions.

COMMENTS

FOOD-NUTRITION

Facility: Margaret Tietz

$ 110,843

2080 12/14/76

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name E. Cohen)

. At present staff includes (1) Food Service Director, (1) dietitian and (1) part-time dietitian. The dietitian and food service director positions should be combined

. Eliminate 1 clerk or 1 secretary.

. A cook should be trained to take over from the relief food service supervisor.

. Eliminate 1 salad worker and 1 food aide.

. Food costs can be reduced from $3.04 per ay per patient by 50¢ based on a comparison ith similar facilities.

Documentation

FACILITY POSITION

JUSTIFICATION

Testimony (name D. Glaser)

1. The Food Service Director also acts as a purchasing agent for food. The remaining dietitian should not be expected to meet with 200 patients, especially in view of the type of patient.

2. Facility agreed to eliminate 1 clerk.

3. Facility agreed

4. Facility agreed

5.) Facility will try to make the reduction
6.) but large food portions are required by the type of patients.

Documentation

Continued on Page 2

UNRESOLVED ISSUES

COMMENTS

FOOD-NUTRITION

Facility: Margaret Tietz

2081

12/14/76

$________

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name E.Cohen)
continued

6. Non-food supply costs can be reduced from 80¢ to 40¢.

Documentation

Based on witness's expertise and comparisons with similar facilities.

FACILITY POSITION

JUSTIFICATION

Testimony (name D. Glaser)
continued

Documentation

Based on witness's expertise and experience as administrator.

UNRESOLVED ISSUES

Facility did not accept Department's recommendation to combine Food Service Director with dietitian.

COMMENTS

2082

Facility: Margaret Tietz

12/14/76

CLEANLINESS AND SAFETY

$ 91,348

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name H. Henkin)

1. Abolish 3 housekeeping aides by reducing to 22 persons consisting of 17 maids and 4 porters plus 1 replacement for persons on vacation, ill, etc.
2. Abolish 3 laundry aides.
3. Abolish additional housekeeping aide if central supply technician is to be retained in Nursing Administration.

Documentation

FACILITY POSITION

JUSTIFICATION

Testimony (name Mr. Mesh)

1. (a) Four porters were set because the State guideline recommends "building service porters" be set by multiplying the number of maids by ¼. Guidelines say "hospital porters" are reached by using a 1/3 factor and should therefore be set at 5, not 4.

   (b) One replacement is insufficient because it is based on a premise of 15 days off when in fact, employees have 35 days off. Therefore total should be 25 persons based on the facility's interpretation of State guidelines.

Documentation

Continued Page 2

UNRESOLVED ISSUES

COMMENTS

Facility: Margaret Tietz

CLEANLINESS AND SAFETY

2083 12/14/76

$

DEPARTMENT CUT RECOMMENDATIONS	FACILITY POSITION
Justification	**JUSTIFICATION**
Testimony (name H. Henkin) continued	Testimony (name Mr. Mesh) continued
	2. Laundry aides cannot be abolished because it would be impossible for other housekeeping employees to pick up this work.
Documentation	**Documentation**
Based on State guidelines and comparison with similarly sized facilities.	Based on the facility's interpretation of State guidelines.
[illegible]	

UNRESOLVED ISSUES

Facility refuses to accept Department's recommendations.

COMMENTS

SOCIAL SERVICES

$ 25,902

Facility: Margaret Tietz

12/14/76

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name Madeleine Penachio)

Abolish 1 MSW
Reduce 1 MSW to a BSW
Retain 1 MSW
Retain ½ clerk if admitting work is done as well.

There does not appear to be need for additional staffing due to any special needs of these particular residents.

Documentation

Based on witness's experience and expertise.

$187

FACILITY POSITION

JUSTIFICATION

Testimony (name David Glaser)

Nazi holocaust victims have special needs requiring more than average social worker possesses.

Documentation

Based on witness's expertise as nursing home administrator.

UNRESOLVED ISSUES

Facility will not accept Department's recommendations.

OMMENTS

LEISURE-TIME ACTIVITIES

2085

Facility: ______________________

12/14/76

$ 23,980

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name Madeleine Perachio)

1. In SNF, "Good State" rating requires 60 hours)

2. In HRF, there is no code requirement, but 35 hours is considered maximum.

Therefore, total time should be 95 hours. Presently, facility is providing 152 hours per week.

Therefore, 1 employee could easily be cut, reducing total staff from 4 to 3:

Documentation

Based on Hospital Code and witness's expertise and experience.

FACILITY POSITION

JUSTIFICATION

Testimony (name David Glaser)

1. Facility is prepared to eliminate one part-time (12 hour) employee reducing to a 140 hours.

2. Cutting to 95 hours is impossible because the Nazi holocaust victim has special needs which must be met in extra leisure time activities.

Documentation

Based on witness's expertise.

UNRESOLVED ISSUES

Department's recommendation to cut back to 95 hours was not met. Facility is only willing to cut back to 140 hours.

COMMENTS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---X

DEFENDANTS' EXHIBIT CC

NEW YORK ASSOCIATION OF HOMES FOR
AGING, INC., et.al., on behalf of :
themselves and all other nonprofit
residential health care facilities :
which render services to Medicaid
sponsored patients, :

Plaintiffs, :

-against- :

PHILIP L. TOIA, as Commissioner of :
Social Services of the State of New York,
ROBERT P. WHALEN, as Commissioner of :
Health of the State of New York,
PETER GOLDMARK, as Director of the :
Budget of the State of New York, and
HUGH L. CAREY, as Governor of the :
State of New York,
:
Defendants.
---X

Pursuant to the instructions of the Court, staff of the New York State Department of Health met with representatives of Daughters of Sarah, (hereinafter "the facility") on December 14, 1976. In the course of such meeting the Department's staff advised the representatives of the Facility of its position with regard to proposed cuts in the operational expenses of the facility, and such representatives advised the Department's staff of their views. Following are a Findings of Fact and a summary of the respective views:

FINDINGS OF FACT

2087

Recommended Cuts

Administration	$30,704
Nursing	34,500
Medical Services	31,154
Maintenance	24,000
Social Services	12,354
Leisure Time Activities	7,970
Dietary	184,500
Physical Therapy	13,000
Non-Reimbursable Expenses	17,233
Fringe Benefits	13,278
Transportation	78,553
Total	$447,246

Facility has already accomplished or planned certain reductions in cost of administration, podiatry, optometry, speech pathology, maintenance, leisure time activities, dietary, physical therapy services, and transportation. Primary unresolved issue concerns employee meals. Free meals are being eliminated; however, a minimal charge of 50¢ per meal is unrealistic due to actual cost of raw food, staff, and preparation costs.

This facility, by making our recommended reductions, can reduce costs even further and still maintain patient care and services at the Good-State level.

Summary

1.	Loss claimed by facility	$431,500
2.	Total reductions proposed by department	$447,246
3.	Total dollar reductions accepted by facility	$159,488
4.	Items of disagreement (nursing, meals and partial cuts in other areas)	$287,758

Attachment: Worksheets

X

New York State Department of Health/Daughters of Sarah

Operational Category	Comments	Comments
Administration	1. Eliminate Personnel and Purchasing Manager.	"1. Took issue on eliminating Personnel and Purchasing Manager
	2. Eliminate two bus. office/personnel employees.	"2. Have eliminated two/ bus. office personnel
	Total Savings $ 30,204	"Total Savings $ 15,600
Nursing	1. Decrease three F.T. nursing aide positions.	"1. Took issue with decreasing three F.T. nursing aide positions.
	2. Substitute LPN's for RN's.	"2. and Substitute LPN's for RN's.
	3. Eliminate 1 secretary for nursing office.	"3. and Eliminate 1 secretary for nursing office.
	Total Savings $ 34,500	"
Medical Services	1. Ceilings for Medical Director and M.D. Services.	"1. Accepted ceiling- believe amount above ceiling will be Part B Medicare reimburseable.
	2. Podiatry-Salary reduced to Medicaid fee schedule.	"2. Podiatry-Salary reduced from $20/hr to $15/hr (507 hours).
	3. Optometry-Salary reduced to Medicaid fee schedule.	3. Optometry-Reducing Salary of Optometrist to around $1,500.

X

2089

New York State Department of Health/Daughters of Sarah

Operational Category	Comments	Comments
Medical Services (continued)	4. Speech Pathology Salary reduced to Medicaid Fee Schedule	"4. Speech Pathology- "reducing Salary as of "January 1, 1977 to "$10/hr.
	Total Savings $ 31,154	"Total Savings $ 7,335
Maintenance	1. Eliminate three employees	"1. Lowered salary of "Supervisor,$19,000 to "$14,000. "2. Eliminated two "employees
	Total Savings $ 24,000	"Total Savings $ 20,000
Social Services	1. Eliminate two current MSW's. Replace with two BSW's plus one MSW consultant or 1 MSW plus BSW.	"1. Took issue with any "reduction in this area. " "
	Total Savings $ 12,854	"
Leisure Time	1. Eliminate one activities aide, one art instructor, one weaving instructor.	"1. Eliminated one aide " during 1976 and will "eliminate weaving instru- "ctor as of January 1,1977. "2. Took issue with "elimination of art "instructor.
	Total Savings $ 7,970	"Total Savings $ 6,800

X

New York State Department of Health/Daughters of Sarah

Operational Category	Comments	Comments
Dietary	1. Eliminate free meals (includes food costs, staffing, and costs of preparation).	"1. Facility will charge "50¢ per meal as of "January 1, 1977. "
	Total Savings $184,500	"Total Savings $ 36,000
Physical Therapy Services	1. Eliminate two P.T. aides.	"1. Facility as of "August,1976 eliminated "one P.T.aide.
	Total Savings $ 13,000	"Total Savings $ 6,000
Non-Reimburse-able Expenses	1. Eliminate as cost item on HE-2.	"1. Facility in doubt as "to content of this item "item on HE-2.
	Total Savings $ 17,233	"
Fringe Benefits	1. Pro rata with suggested cuts.	"1. Facility recogni "cuts pro rata with their "intended cuts (no estimate "here).
	Total Savings $ 13,278	"
Transportation	1. Reduction of vehicles to lease of one vehicle for patient transport.	"1. As of January 1, 1977 "facility will eliminate "5 drivers and two vehicles. "2. Still requires two "vehicles and one full-time "driver.
	Total Savings $ 78,553	"Total Savings $ 67,753

2091

WORKSHEETS

12/14/76 Meeting

FACILITY: Daughters of Sarah

IN ATTENDANCE

DEPARTMENT STAFF

M Cavacelli
B. Duncan
L. Zukas Gillian M. Zukas - Health Program Adm. NYSDH - Albany Regional Office
Noreen Schaffer Nursing Services Consultant ARO.
P Friel Patricia C. Friel - Reg. Nurs. Services Adm., ARO
S. Gaudio Salvatore M. Gaudio P.T. Alb. Reg. Office N.Y.S.
E. Augustine Edward B. Augustine, Hosp. Adm. Consultant A
J. Vandenburgh - Janet M. Vandenburgh, Sr. Acctnt, ARO, NYS
K A Comeau - K. Comeau - N.H. + Home Med. Care Consultant - NYSDH
H. Fabry Harold Fabry M.D. - Assistant Regional Health Director Albany Regional Office N.Y.S. Dept. of Health
S. Rosen [illegible]
M Nichols Miriam K. Nichols, Nutrition Services Cons. ARO
T. Opela T. Terry Opela Reimb. Rate Setting
T Freedland - Terry Freedland, Central Enforcement Unit, Department of Health
E. Walther Edward R. Walther, Principal Sanitarian, Bur. Facility Environmental Control NYSDH
A. Reilly - Agnes C. Reilly Asst Director OPHSW

FACILITY REPRESENTATIVES

Mitchell Waife
Ted Rosen - Daughters of Sarah Nursing

ADMINISTRATION AND GENERAL

2092 12/14/76

$ 30,204

DEPARTMENT CUT RECOMMENDATIONS

~~Justification~~

Testimony (name E. Augustine)

liminate:

.2 Business office clerks, and

.1 Purchasing and Personnel Merger

ustification

The one Administrative Assistant can bsorb the personnel and purchasing responsi-ilities with clerical assistance.

This would not de-centralize these unctions, and major department heads (mainten-nce, Dietary and Pharmacy), are not in the entralized purchasing program. There is limited fiscal activity--small amount of edicare and accounts receivable in this nurs-ng home.

FACILITY POSITION

~~JUSTIFICATION~~

Testimony (name T. Rosen)

Currently Employ:

1 Business Manager
1 Accounts Payable Clerk
1 Accounts Receivable Clerk
1 Payroll Clerk
1 Administrator
1 Administrative Assistant
1 Purchasing and Personnel Manager Clerk
2.5 Business office clerks

Justification

a. Have already eliminated the two Business office clerks.

b. They need the Purchasing and Personnel Manager to be fully centralized, do comparative shopping for the best buys, interview employees, check references, etc.

UNRESOLVED ISSUES

Facility's Position that

1. Personnel and Purchasing Manager cannot be eliminated.

COMMENTS

NURSING ADMINISTRATION,

12/14/76

2093

$ REGISTERED NURSES, AIDES, AND ATTENDANTS

$34,500

DEPARTMENT CUT RECOMMENDATIONS

~~Justification~~

Testimony (name Noreen Schefler)

1. Decrease nurses on Unit #2 by 3 F.T. nursing aides.

2. Substitute 4 F.T. LPN's for RN's on Units 1 and 2.

3. Eliminate 1 secretary for nursing office.

Justification

1. Unit #2 houses "light" HRF level of care patients. The 3 nursing aides represent a decrease of .5 hours/pt/24 hrs, which is adequate for these patients.

2. Currently have RN supervision on all shifts. LPN can look to these RN's for supervision.

Documentation

All changes meet maxi standards of the NYS Hospital Code.

FACILITY POSITION

JUSTIFICATION

Testimony (name Mr. Rosen)

1. Unit #2 needs 2.2 hours of care/pt/24 hrs, just like Unit #1. Nursing Home is submitting DMS-1 forms on these patients, which indicate that 2.2 hours is necessary and no cuts can be made.

2. Bad experience with LPN's. Do not give leadership to nursing staff; do poor nursing assessments, etc.

3. Although 2 nursing office secretaries are employed, 1 is used for the nursing office; the other works for the 2 doctors, taking dictation, doing entries, etc. She is a Medical Secretary (not nursing).

UNRESOLVED ISSUES

Facility does not agree with the Department assessment of the level of needs for 100 patients. We feel they are "high" HRF; facility contends they are typical SNF patients.

COMMENTS

Department suggested that facility consider requesting 100 SNF beds be classified to HRF. This would result in additional reduction in nursing staff than currently employed.

Facility: [illegible]

MEDICAL CARE - A

2094 12/14/76

$ 22,404

DEPARTMENT CUT RECOMMENDATIONS

~~Justification~~

Testimony (name Dr. Fabry)

1. Reduce salaries of Medical Director to the epartment's allowable costs (ceiling). eiling is applied Statewide to all nursing omes using formula.

2. Allow 1½ visits/month/patient for direct edical services.

ustification

1. Allowable for M.D. Director for this size ursing home is a Statewide applied ceiling.

2. Because we feel that ½ of the patiients re "high" HRF level, the allowance of 1½ isits/pt/month is generous. Also the Code llows alternate schedule of visits if pproved by URC (once every 60 days).

FACILITY POSITION

JUSTIFICATION

Testimony (name T. Rosen)

1. Claim all 200 patients need SNF level of M.D. services. Employ "top notch" M.D.'s that do a lot of preventive work.

2. Reimbursement to nursing home by Medicare Part B will offset costs for M.D.'s above the ceiling.

UNRESOLVED ISSUES

1. Level of care needs of 100 patients disputed by Department and nursing home.

2. Part B reimbursement is speculative.

COMMENTS

1. If facility meets ceiling allowance, will improve its cash flow.

2. Note - The Medical Director has a private office in the nursing home where he sees his private patients. Mr. Rosen stated that these patients are seen after hours, and the private practice is decreasing. Further stated that Medical Director is not charged by the nursing home for this office.

MEDICAL CARE - B Z095 12/14/76

$ 8,750

DEPARTMENT CUT RECOMMENDATIONS	FACILITY POSITION
~~Justification~~	JUSTIFICATION
Testimony (name Dr. Fabry)	Testimony (name T. Rosen)
I. Podiatry Services Reduce salaries to Medicaid Fee Schedule allowance (Prudent Buyer)	I. As of 1/1/77, podiatrist's salary will be reduced from $20/hr. to $15/hr, with savings of $2,535. However, feel that 100% of all patients need on-going podiatric care. (Medical Care Evaluation Study showed this).
II. Optometry Services	II. As of 1/1/77, optometrist's salary will be reduced to $1,500/yr. Will maintain current utilization, as he feels this is what the patients need.
III. Speech Pathology As above.	III. As of 1/1/77, fee for speech pathology will be $10/hour, for a $3,240/yr. savings. Will maintain current utilization for speech pathology services.
~~Documentation~~	~~Documentation~~

UNRESOLVED ISSUES

The Department feels that these services are overutilized, and a reduction in the # of hours each specialist works can be accomplished without adversely affecting patient services.

COMMENTS

Facility has made plans to reduce fees for these services by 1/1/77.

CLEANLINESS AND SAFETY 2096 12/14/76

$ 24,000

DEPARTMENT CUT RECOMMENDATIONS

Testimony (name J.Vandenburg)

Eliminate 3 maintenance employees.

Justification

1. All electric building (no boilers to maintain, etc.).
2. Start-up problems with physical plant should be resolved by now. Has been open four years.

Documentation

FACILITY POSITION

JUSTIFICATION

Testimony (name I. Rosen)

Currently employs:

a. One plant superintendent whose salary has already been cut from about $19,000 to about $14,000/year.

b. Nursing Home has already cut two maintenanc men @ $15,000/year.

c. Preventive maintenance is required to upkee building.

Documentation

UNRESOLVED ISSUES

Department feels that one maintenance man can still be eliminated.

COMMENTS

$ 12,854

2097 12/14/76

DEPARTMENT CUT RECOMMENDATIONS

Testimony (name A. Reilly)

Budget for Social Services should be $23,600.

1. Eliminate the 2 MSW's. Replace with 2 BSW's and MSW Consultant; or

2. keep 1 MSW F.T. and 1 BSW.

Justification

Hospital Code does not require any full-time MSW's on staff. BSW meets Code regulations. (731.10)

Documentation

[illegible]

FACILITY POSITION

JUSTIFICATION

Testimony (name I. Rosen)

1. Nature of casework services for their patients (includes family conferences, home visits, etc.) require even more than 2 MSW's. However, the 2 MSW's now employed (@ $18,277/year) are very experienced and do not require supervision

2. He will not dilute or reduce these service to the patients and their families.

Documentation

UNRESOLVED ISSUES

Department finds salaries excessive for MSW's and lessor qualified social work personnel can be utilized with same quality services to patients and families.

COMMENTS

LEISURE-TIME ACTIVITIES

2098 12/14/76

$ 7,970

DEPARTMENT CUT RECOMMENDATIONS

~~Justification~~

Testimony (name A. Reilly)

liminate:

- 1 Activities Aide
- 1 Art Instructor
- 1 Weaving Instructor

ustification

Weaving Instructor is now a luxury. Has very active and successful volunteer program. he Director and 1 aide meets 731.6 of Code nd still maintain excellent leisure time ervice to patients.

FACILITY POSITION

JUSTIFICATION

Testimony (name T. Rosen)

1. Already eliminated 1 activity aide.

2. Will eliminate Weaving Instructor on 1.1.77.

3. Art Instructor is not a luxury; arts and crafts very important to patients.

~~Documentation~~

UNRESOLVED ISSUES

Department feels that by now the Art Instructor should have instructed the aide in performing necessary duties. This person is a luxury.

COMMENTS

Note that 50 psychiatric/geriatric patients on a special unit are richly covered by specially assigned aides to this unit. LTA staff, therefore, provide service to 150 patients.

FOOD-NUTRITION

12/14/76

$ 184,500

DEPARTMENT CUT RECOMMENDATIONS

Testimony (name M. Nichols)

1. Eliminate free meals to employees and guests.
*2. Reduce 9 dietary aides.

Justification

1. Free meals is not a common practice in this area.
2. $1.75/meal is a low estimate in this home. Kosher food is more expensive.

Documentation

FACILITY POSITION

JUSTIFICATION

Testimony (name T. Rosen)

1. Contends that free meals are a fringe benef to employees and necessary to avoid threat of unionization. As of 1/1/77, will charg 50¢/meal, for savings of $36,000.
2. Portions to staff have been reduced (second will cost another 50¢).
3. Have submitted request to regional office t convert a garage to employee lunch room, s employees can bring their own lunch. (Kosh law precludes this practice now.)
4. No restaurants/cafes in area for employees get meal on a 30-minute break.

Documentation

UNRESOLVED ISSUES

Facility contends the estimated Department's savings ($126,000) is not really a savings, since it is a fringe benefit and cost of this fringe if denied to employees will be included in salaries.

COMMENTS

*Department acknowledges that the total savings in free meals includes the nine employee salaries. However, the calculation of $1.75/meal (includes food costs, staffing and cost of preparation) is low, since the cost of food in this nursing home is higher than we originally estimated. Therefore, the $1.75/meal is a low figure, and the savings of $126,000/year is a low figure. Department believes that a more accurate cost/meal as noted above includes the $58,500 savings, incorrectly identified as salaries.

REHABILITATION THERAPIES

2100 12/14/76

$ 13,000

DEPARTMENT CUT RECOMMENDATIONS

Testimony (name S. Gaudio)

Eliminate two physical therapy aides.

Justification

1. Excessive pallitive and maintenance therapy in this home.
2. Very few dischargees, which means there is an extensive number of long-stay patients which reach plateaus of rehab. potential. The continued maintenance therapy can be done by floor nurses, not requiring physical therapy aides for this service.

Documentation

FACILITY POSITION

JUSTIFICATION

Testimony (name T. Rosen)

1. August, 1976, one P.T. aide was cut @ $6,000/year.
2. Claims patients deteriorate when removed from maintenance P.T.
3. Has increased the number of rehab. admissions.
4. P.T.'s consult with floor nurses.
5. Patients and MD's already upset over the one cut.

Documentation

UNRESOLVED ISSUES

Department feels that another physical therapy aide can be eliminated, while still maintaining Good-State level of services.

COMMENTS

Facility: Daughters of Sarah N.H.

2101

12/14/76

OTHER (NON-REIMBURSABLE EXPENSES)

$ 17,233

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name E. Augustine)

Eliminate these as a cost item; not related to patient care. These expenses were not explained adeuately on HE-2P, submitted by facility.

Documentation

$137

FACILITY POSITION

JUSTIFICATION

Testimony (name T. Rosen)

Mr. Rosen does not know what these expenses are.

Documentation

UNRESOLVED ISSUES

COMMENTS

Facility: Daughters of Sarah N.H.

OTHER (FRINGE BENEFITS) 2102 12/14/76

$ 13,278

DEPARTMENT CUT RECOMMENDATIONS	FACILITY POSITION
Justification	**JUSTIFICATION**
Testimony (name T. Opela)	Testimony (name T. Rosen)
Pro-rata amount with our suggested reductions in staff salaries.	• Does not accept the $13,278 figure. Agrees there will be some reduction in costs for fringe benefits later.
Documentation	**Documentation**

UNRESOLVED ISSUES

COMMENTS

OTHER (TRANSPORTATION)

$ 73,553

2103

Facility: Daughters of Sarah N.H.

12/14/76

DEPARTMENT CUT RECOMMENDATIONS

Testimony (name E. Augustine)

1. Eliminate the use of 2 mini-buses, 1 station wagon and 1 passanger car.

2. Reimburse at allowable cost of $2,800 for rental of 1 vehicle to transport patients.

Justification

1. Unnecessary. After 4 years of transporting employees from a central pick up in Troy, employees can now arrange for their own transportation.

2. Facility on a bus line.

Documentation

FACILITY POSITION

JUSTIFICATION

Testimony (name T. Rosen)

1. Buses do not run weekends, nor at 7 a.m. or 7 p.m. for morning and nights shifts.

2. Feels an obligation to the employees who worked at the old Daughters of Sarah Nursing Home in Troy. Are loyal and dependable workers who stayed when new home opened in Albany. Would be chaotic if transportation for them was eliminated.

3. Has already cut out the 2 mini buses. Have helped employees form car pools. Use of group taxis--expense would create a threat of unionization.

4. On 1/1/77 will cut 5 drivers.

5. Need 2 cars to transport patients; for use by social workers to make home visits, go to bank, etc.

UNRESOLVED ISSUES

1. Facility contends it needs a full time driver. Department feels this position could be combined with a maintenance position.

2. Facility contends it still needs the 2 cars for all the patient transport to hospitals, clinics, etc., and staff use in providing services.

COMMENTS

2104

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS' EXHIBIT DD

---X

NEW YORK ASSOCIATION OF HOMES FOR :
AGING, INC., et.al., on behalf of
themselves and all other nonprofit :
residential health care facilities
which render services to Medicaid :
sponsored patients,

Plaintiffs, :

-against- :

PHILIP L. TOIA, as Commissioner of :
Social Services of the State of New York,
ROBERT P. WHALEN, as Commissioner of :
Health of the State of New York,
PETER GOLDMARK, as Director of the :
Budget of the State of New York, and
HUGH L. CAREY, as Governor of the :
State of New York,
:
Defendants.

---X

Pursuant to the instructions of the Court, staff of the New York State Department of Health met with representatives of St. Cabrini Nursing Home, Inc. (hereinafter "the facility") on December 14, 1976. In the course of such meeting the Department's staff advised the representatives of the Facility of its position with regard to proposed cuts in the operational expenses of the facility, and such representatives advised the Department's staff of their views. Following are a Findings of Fact and a summary of the respective views:

BEST COPY AVAILABLE

FINDINGS OF FACT:

Department recommended that the facility make cuts as indicated above and summarized below:

	1974 Expenditure Level	Suggested Cost	Savings
Nursing Administration	$145,000	$145,000	--
Registered Nurses	641,000	96,000	$545,000
LPN's	--	153,600	(153,600)
Aides & Attendants	530,000	731,000	(201,000)
Food - Nutrition	463,000	415,000	48,000
Cleanliness & Safety	426,000	349,000	77,000
Social Work	34,000	20,000	14,000
Administration	343,000	190,000	153,000
	$2,582,000	$2,099,600	$482,400

1975-1976 Trend Factor 1.1810

Cost which is representative of the savings that can be achieved in 1976 $569,714

The Department maintains that these cuts will not cause irreparable harm to patients.

Summary

1.	Loss claimed by facility	$478,472
2.	Total reductions proposed by Department	$569,714
3.	Total dollar reductions accepted by facility	None
4.	Items of disagreement	Total Department Proposal

	New York State Department of Health	St. Cabrini Nursing Home Inc.
Operational Category	Comments	Comments
Nursing Administration	There are presently 7.8 employees in this area accounting for $145,000 in salaries. The Department recommends 7.8 employees at $145,000. (See Exhibits A & B)	No issue remains.
Registered Nurses	Department recommends reduction of from 40-45 RN's to 6.4 and the addition of 12.8 LPN's amounting to a saving of $391,400.. Part of this saving will be offset by increase in aide and attendant coverage.	

New York State Department of Health		St. Cabrini Nursing Home, Inc.
Operational Category	Comments	Comments
Aides and Attendants	Present aide salary expense of $530,000 to be increased to $731,000 by bringing total number of aides employed to 80. An increase of $201,000 in salary expense. Department saving: combining "Registered Nurses" and "Aides and Attendants" categories = $190,400.	
Administration General	Department recommends a reduction in the expenditure level from $343,000 to $190,000 which results in a savings of $153,000. The $190,000 level can be achieved by the following:	Administrator is paid $31,806

2108

New York State Department of Health			St. Cabrini Nursi Inc.
Operational Category	Comments		Comments
Admin. (cont.)	administrator's salary	$30,000	Contest salary le Claims 1976 costs .951 in administration bu does not include controll eping, personnel and pu functions.
	1 controller	20,000	
	4 bookkeepers @ $10,000	40,000	
	2 clerks @ $7,500	15,000	
	2 secretaries @ $7,500	15,000	
	Services purchased from affiliated hospital	70,000	
	Total proposed admin. costs	$190,000	

New York State Department of Health		St. Cabrini Nursing Home, Inc.
Operational Category	Comments	Comments
Cleanliness	Housekeeping salary expenses can be reduced from present level of 125,300 to 114,000. Sufficient staffing would consist of: 1 supervisor 10,000 13 maids 104,000 Reduction represented 11,300	Contests salary levels and staff reduction. Stated that each employee performs necessary task.
	Maintenance salary expense can be reduced from present level of 126,500 to 93,000. Sufficient staffing would consist of: 1 chief engineer 19,000 4 maintenance men 44,000 1 general maintenance man 10,000 2 security guards 20,000 Reduction represented 33,500	Contests salary levels and staff reduction.
	Laundry & linen expense can be reduced from 88,400 to 68,200. Reduction represented 20,200	Contested industry average submitted by Department of $1 per day

	New York State Department of Health	St. Cabrini Nursing Home, Inc.
Operational Category	Comments	Comments
Cleanliness & Safety (cont.)	Repair-maintenance expense can be reduced from 67,200 to 52,000, a reduction of 15,200. Actual 1975 expense amounted to $44,700	Questioned Department's knowledge of physical plant and complexity of machinery
Food and Nutrition	Facility is spending $4.72 per patient day on food related costs (exclusive of raw food costs). The industry average is $3.98 per patient day. Department suggests a reassessment of the numbers & types of personnel employed as well as salary levels in order to reduce the 54¢ excessive costs. Such a reduction would effect a savings of $48,000.	No comment
Social Services	Social work costs can be reduced from cu[illegible] 34,000 to 20[illegible] [illegible]imination of 1 [illegible]gree social w[illegible] [illegible]gested [illegible] [illegible] degree [illegible] 12,000 and [illegible] aide at	1. Disputed salary levels 2. Facility noted that they had received instructions from NYSDH to add a secretarial position because of their complex record keeping system. 3. Facility stated length of stay at Cabrini is shorter than

2111

Exhibit A

St. Cabrini Nursing Home

Staff, in performing their analyses of nursing administration and nursing services of St. Cabrini, overlooked several sources of information and erred in their interpretations of such data as were used. The original staff report and recommendations thus misinformed Deputy Commissioner Doctor Cicero and, in turn, the Federal District Court and the facility -- particularly in regard to staff analysis of and advice on nursing administration.

These errors and misinterpretations have been corrected. Current evaluation indicates that the facility's nursing services administration budget should remain at or near its previous levels but that major reorganization is necessary. The proposed reorganization should lead to more effective direction of the nursing services, better supervision of nursing services and much more cost effective provision of nursing services.

With minor modifications, the Department's recommendations for reorganizing the direct care nursing services will produce significant savings, improve nursing care of patients, allow the facility to retain its "Good-State" rating in nursing and provide nursing care more efficiently and effectively.

NURSING ADMINISTRATION

	Our Report	Actually Had	Proposed
Director	1	1	1
Asst. Director	3	1	1
Inservice Education Coordinator	1	1	
Relief Factor		.8	
Sub Total	5	3.8	2
Secretary		1	1
Supervisor	3	2	3
Relief Factor		1	1.8
Sub Total	3	3	4.8
Total	8	7.8	7.8
RN	44.4	40-45	6.4
LPN	0	0	12.8
Aide	58	52-60	80
Ward Clerk		2	2

		Proposed	Previous
Costs	RN's	96,000	641,000
	LPN's	153,600	530,000
	Aides	731,000	
		980,600	1,171,000

Suggested Reduction: 190,400

PlEASE Print
your NAME below
your signature

2113

NAME	Title	NYSDH	Facility	Othe
	Asst.		St Cabrini	
OBERT FISCHER	[illegible]		Nursing Home	
Sister Josephine Tsuei	Administrator		Cabrini Health Care C	
hyllis S. Goodwin	Dir. of N.S.		Cabrini Health Care Ctr	
ALVATOR LAMPIASI	Acting Administrator		St Cabrini N.H.	
AVID J. STERN	Attorney - NYAHA			
DANIEL J. Rinaldi	Director BHS Health Dept			
Ruth E. Simpson	Consultant Bur of H.N. Services			
AWRENCE STAN..	Consultant Physical Therapist	Health Dept		
inifred [illegible]	Health Program Administrator			W. PRO
ALAN MARSHALL	MTGE. ADMIN.	NYSDH		
Bruce Friedman	Public Health Sanitarian, NYSDH			
[illegible] Reynolds	Director, Social Work, NYS Health Dept			
NTHONY FLAHERTY	HOSPITAL NURSING SERVICES CONSULTANT			W.P.R.O. NYS
Victoria T. Tufft	Regional Hospital Nursing Services Administrator			W.P.R.O. NYS
ELIZABETH M. LIND	REGIONAL P.H. NUTRITIONIST			WPRO-NYSD
Mindaugas Jatulis	Associate Engineer, Bur Fac. Env. Control			NYSD
REGINA N. MALONE	H.P.A	NYSDH		
W. FOLEY	Attorney	" "		

NURSING ADMINISTRATION 2114 12/14/76

PARTMENT CUT RECOMMENDATIONS

stification

Testimony (name V. Tefft)

rsing Administration:
ility presently sustains administrative
sing staff: 1 director
1 assistant director
1 in service education co-ordinator

elief factor of .8
1 secretary
2 nursing supervisor

elief factor of 1.0
al 7.8

department proposes the following level
staffing:
1 director
1 assistant director
1 secretary
3 nursing supervisors

elief factor of 1.8
7.8

reduction of present level of 145,000

FACILITY POSITION

JUSTIFICATION

Testimony (name ______________)

Documentation

NRESOLVED ISSUES

COMMENTS

REGISTERED NURSES 2115 12/14/76

$

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name V.Tefft)

R.N. Staffing
Facility employs 40-45 registered nurses

It is recommended that the facility employ 6.4 registered nurses. The facility does not employ licensed practical nurses. It is recommended and proposed that the facility employ 12.8 LPN's.

This combination of RN's and LPN's would provide an acceptable level of care and greatly reduce costs.

Cost of 6.4 R.N.	96,000
Cost of 12.8 LPN	153,600
Representing a total of	249,600
a reduction of	391,400

FACILITY POSITION

JUSTIFICATION

Testimony (name ____________)

Documentation

UNRESOLVED ISSUES

COMMENTS

AIDES AND ATTENDANTS 2116 12/14/76

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name V. Tefft)

he facility presently employs 52 to 60 aides and
tendants at a cost of $530,000. It is pro-
sed that the facility employ 80 aides at a cost
731,000.

h aide coverage would result in a cost of
,000 representing an increase of 190,400.

combination of the cost savings resultant
m the registered nurse and licensed practical
rses schedule and the increased costs attributed
aide coverage would yield a combined cost
uction figure of $190,400.

Documentation

FACILITY POSITION

JUSTIFICATION

Testimony (name ______________)

Documentation

RESOLVED ISSUES

MMENTS

ADMINISTRATION AND GENERAL

2117 12/14/76

$ 190,000

DE[illegible]TMENT CUT RECOMMENDATIONS

Justification

Testimony (name D. Rinaldi)

urrent Costs	Suggested Costs	Savings
$343,000	190,000	153,000

Testimony by Mr. Rinaldi:

Industry average expense per patient day is $2.34 per patient day cost for this facility is $5.07. On basis of 68,178 patient days the 5.07 figure represents an excess annual expens of 186,000

Recommendations:

1. Reduce administrators salary from 40,000 to 30,000.
2. Recommended administrative staff for this facility:

1 controller	-20,000
4 account./ bookkeepers	-10,000 each
2 clerks at	- 7,500 each
2 secretarys	- 7,500 each
Suggested Business office costs	90,000

Based on submitted info. 236,000 is used to purchase services from affiliate hosp.

It is suggested that facility review and make necessary adjustments to allocation of costs between nursing home and hospital to reflect actual administrative expenses of nursing home.

Based upon industry norms. proper allocation of remaining nursing home administrative expenses should not exceed $70,000.

FACILITY POSITION

JUSTIFICATION

Testimony (name A. Fischer-Asst.Controller
Phyllis S. Goodwin
Sister Josephine Tausi-Admin.
David Stern, Atty.)

Administrator now paid 31,806

Documentation

1. Contest salary levels
2. Contested suggested staffing said they nee existing level which includes:

1 administrator	31,806
secretary	7,482
secretary	9,385
clerk/typist	10,000
switchboard	10,355
switchboard	9,055
Dir.of Volunteers	11,956
Receiving Clerk	[illegible]
Pastoral Co-od.	7,200
Total	107,951 -- 1976

Stated that above figures exclude controller all bookkeeping, personnel and purchasing functions.

COMMENTS

12/14/76

CLEANLINESS AND SAFETY

$ 77,000

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name M. Jatulis)

rrent Costs	Suggested Costs	Savings
426,000	$349,000	$77,000

isting costs detailed in HE-2

sekeeping salaries	125,300
sekeeping supplies	8,600
ndry & linen	88,400
air & main. salaries	126,500
air & main.	67,200

eral

ommendations made by Mr. Jatulis

decrease numbers of staff

decrease salaries of staff

decrease cost of laundry services and repair & maintenance expenses

fic Recommendations:

ting housekeeping staff	15.1
gest	14
ting maint. staff	7.4
gest	6
ting security	2.4
gest	2

ting maintenance salaries	126,500
gested staffing	
1 chief engineer.	19,000
4 maintenance @ 11,000 each	44,000
1 general maintenance man	10,000
2 security guards @ 10,000	20,000
l recommended maintenance aries	93,000
esents reduction of	33,500

ting housekeeping salaries	125,300
gested	
pervisor	10,000
ids @ 8,000	104,000
Total	114,000
ction represented -	11,300

ndry & Linen services

sting costs:	88,40
gested costs:	68,2

duction is based on st o

patient da

uction 1

FACILITY POSITION

JUSTIFICATION

Testimony (name ____________)

D. Stern

A. Fischer - Asst. Controller

Sister Josephine Tsuei - Admin.

Phyllis S. Goodwin

Salvator Lampiasi

Contest salary levels

States that each employee performs a necessary task.

Contests $ 1 per patient day computation.

Facility: ______

2719 12/14/76

CLEANLINESS AND SAFETY

$ 77,

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name M. Jatulis)

CONTINUATION

Repair and maintenance expense

existing expense:	67,200
recommended expense:	52,000
reduction represents	15,200

justification: New building should present minimal expense; in actuality maintenance expense for 1975 as reported amounted to $44,700. Tota

Total reduction in costs: $80,200

FACILITY POSITION

JUSTIFICATION D. Stern, A. Fischer-Asst. Control
Sister Josephine Tsuci-Admin.
Testimony (name ______)
Phyllis S. Goodwin, Salvator Lampiasi

Questioned whether department has personal knowledge of physical plant; stated that the department does not allow for the complexity, attendant maintenance expense of the equipment in this new facility.

Documentation

FOOD AND NUTRITION

12/14/76

48,000 savings

EPARTMENT CUT RECOMMENDATIONS

ustification

Testimony (name Mrs. Lund)
Nutritionist, WHRO

rent costs	Suggested Costs	Savings
63,000	415,000	48,000

get submitted to the Department in '73
imated $45,775 costs for dietary dept.;
refore, current costs exceed what was
posed by approximately $17,000. The
gested cut of 48,000 is much less than the
,000 difference.

food cost of 2.07 per patient day is
eptable to the Department. Total food
ated cost per day is $6.79--the average is
08. The difference between 6.79 and 2.07
t be attributed to other food related
enses that amount, 4.71 is excessive. The
partment suggests that the facility re--
luate the number of dietary workers employe
/or the salaries paid.

FACILITY POSITION

JUSTIFICATION

A. Fischer-Asst.Controller
Phyllis S. Goodwin
Sister Josephine Tsuei - Admin.

Testimony (name David Stern .)Atty.

The facility had no comment on the State's position.

Documentation - None

NRESOLVED ISSUES

cause the facility offered no statement and asked no questions on this area, the
ate must consider the issue unresolved.

COMMENTS

BEST COPY AVAILABLE

SOCIAL SERVICES

$28,000

242 12/14/76

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name E. Reynolds)
Director, Public Health S.W.

urrent Costs	Suggested Costs	Savings
$34,000	20,000	

mproper staffing pattern in Social Services. or a 200 bed facility, only 1 masters degree ocial worker and 1 social work assistant is eeded. MSW can do consultation, supervision, intensive casework service where needed.

ocial work assistant can take part in the dmitting process, interview patients and amilies, social assessments, referrals, plans or discharge.

Documentation - None

FACILITY POSITION

A. Fischer-Asst. Controller
Phyllis S. Goodwin
Sister Josephine Tsrei-Admin.

JUSTIFICATION

Testimony (name D. Stern) Atty.

1. Facility felt the 20,000 was not a reasonable figure for the two positions.

2. Facility noted that they had received instruc ions from NYSDH, to add a secretarial position because of their complex record keeping system.

3. Facility stated that the length of stay in St Cabrini is shorter than the average facility.

Documentation - None

UNRESOLVED ISSUES

he comments from the facility indicate that they do not concede any issues. All areas are herefore unresolved.

COMMENTS

he facility's selective admissions policies and emphasis on short term patients with ehabilitation potential results in a high number of discharges.

Mary Manning Walsh Nursing Home Co., Inc.
1/19/77

DEFENDANTS' EXHIBIT EE

FINDINGS OF FACTS

$ 7,854,737	1976 Reported Costs	
$ 6,930,372	1976 Official Rate	SNF per diem $53.48 HRF per diem $37.78
$ 924,635	Deficit	

Department Recommended Cuts

Description	Annual $ Value	Facility Response Annual $ Value
Administration	$ 300,800	
Food - Nutrition	343,000	
Cleanliness & Safety	153,500	
Nursing	239,600	
Social Work	6,300	
Total Cuts:	$1,043,200	Facility to submit additional data

ISSUES

Two important factors should be noted:

(1) The facility has recently submitted a rate appeal which is presently under review. If this appeal is approved by this Department and the Division of Budget, the SNF rate will be increased.

(2) The recently approved bed reclassification which increased the number of SNF beds will result in a rate increase upon approval of the Division of Budget.

Facility: Mary Manning Walsh
N.H. Co., Inc.

1/19/77

ADMINISTRATION

$ 300,800

DEPARTMENT CUT RECOMMENDATIONS

Justification

Statement by: Doctor Michelen

Eliminate 1 Asst. Admin.
Eliminate 1 Dir. of Communication
Eliminate 1 Purchasing Supervisor
Eliminate 1 Asst. Dir. of Finance
Eliminate 1 Paymaster
Eliminate 3 Secretaries
Eliminate 2 Clerks
Eliminate 1 Bookkeeper
Eliminate 1 Peripetologist
Eliminate 1 Personnel position
Eliminate 1 Storeroom clerk
Eliminate 1 Educational Trainer
Reduce by $14,000 physicians' salaries

Documentation

FACILITY POSITION

Justification

Mr. Hallsey
Mr. Burke

Statement by: Mother Aloysius

Not possible to respond at this proceeding, will review the recommendations as a whole. Further, the facility has been recertified for more SNF beds which raises the ceilings.

Documentation

UNRESOLVED ISSUES

Are administrative salaries excessive?
Are publications' expenses excessive?
Can $20,000 coffee shop deficit be eliminated
by increasing prices or closing shop?
Can Beauty Shop deficit be eliminated?

COMMENTS

2124

Facility: Mary Manning Walsh Nursing
Home Co., Inc.

1/19/77

FOOD - NUTRITION

$ .343,000

DEPARTMENT CUT RECOMMENDATIONS

Justification

Statement by: Ms. Blaine

iminate the following positions:
chef
dietician
storeclerk
full-time pantry aides
part-time pantry aides
nuns' dining workers
reduce dietary overtime

arge for:
guest meals and submit # per year
arge for:
employee meals & submit # per year
arge for:
meals of 18 nuns.

Documentation

view of staffing patterns and personal
rveys.

FACILITY POSITION

Justification

Statement by: Mother Aloysius

Dietary study is being done.

This is justified as part-time.
Overtime is prudent for exec. chef; others is unusual.

Guest meals - problem is being eliminated

Employee meals - bound by union contract.

The nuns' pay $173.33 for food, per nun, per mo.

[illegible]

[illegible]

RESOLVED ISSUES

uld 1975 expenses have included salary of employee who left the previous year?
liquor lounge a self-sustaining operation?

MMENTS

order to accomplish these cuts, must centralize food service system.

Facility: Mary Manning Walsh Nursing Ho
Co., Inc.
1/19/77

CLEANLINESS AND SAFETY

$ 153,500

DEPARTMENT CUT RECOMMENDATIONS	FACILITY POSITION
Justification	**Justification**
Statement by: Mr. Lyons	Statement by: Mr. Burke
Reduce housekeeping staff by 10 from 45.9 to 36.	Cuts have been made exceeding this recommendat
Reduce maintenance staff by 1 from 11 to 10.	Union contract prevents overlapping of job responsibilities.
Reduce security staff by 4 from 13 to 9.	Facility now at a complement of 9.
Eliminate 1 laundry aide position	Position has been eliminated.
Laundering for nuns should be charged.	Nuns pay $4.33 per sister/month.
Housecleaning for nuns should be charged.	Nuns pay $34 per sister/month.
Documentation	**Documentation**
Staffing and financial information as submitted by facility.	

UNRESOLVED ISSUES

COMMENTS

2726

Facility: Mary Manning Walsh Nursing Home Co., Inc.

1/19/77

NURSING ADMINISTRATION

$ 239,600

DEPARTMENT CUT RECOMMENDATIONS

Justification

Statement by: Mrs. Dietz - Mr. Carmello

liminate 1 unit manager

onvert 5 RN positions to 5 LPN positions

liminate 12 aides

iminate 4½ RN positions

Documentation Staffing plans of facility repared prior to recertification of beds.

FACILITY POSITION

Justification

Statement by: Mr. Hallisey, Mr. Burke

Because of the recertification of beds, the recommendation is not relevant to today's staffing pattern and patient needs.

Personnel changes are being made and a study being done.

Documentation

UNRESOLVED ISSUES

oes a paper recertification, which increases the number of SNF beds by 30, invalidate the epartment's recommendations for nursing staff reductions when in fact the patients are lready in the facility and receiving nursing care at the SNF level?

COMMENTS

ith the conversion of registered nursing positions to licensed practical nursing positions nd the elimination of others, there should be a corresponding increase of LPN's (4 LPN's).

2127

Facility: Mary Manning Walsh Nursing Home Co., Inc.

1/19/77

OCIAL WORK

6,300

EPARTMENT CUT RECOMMENDATIONS

ustification

Statement by: Ms. Border

educe one secretarial position to ½ time.

Documentation

Staff information from facility at this proceeding.

FACILITY POSITION

Justification

Statement by: Mother Aloysius

Facility wish to check with social work department.

No response at this time.

Documentation

UNRESOLVED ISSUES

COMMENTS

2128

Mary Manning Walsh Nursing Home Co., Inc.
Meeting 1/19/77

Department Staff	Facility Representative
John Shea	Mother Aloysius
Nasry Michelen, M.D.	Sr. Gerard
William Carmello	James Hallisey
Thomas Finnen	Walter Larkin
Phyllis Blaine	Thomas Burke
Dorothy Dietz	James Sanderson - NY Association of Homes for Agin
Feng Lee	
Tom Lyons	
Mike Rivera	
Sharon Borden	

ADDENDUM

The attorney for Mary Manning Walsh asked for and received an opportunity to tell the Health Department how the facility had already initiated a cost containment program.

Here is a summary of his comments:

> The facility has reduced staff. Forty-five less people were on the 1975 SNF payroll then were employed in 1974. The HRF payroll in 1975 had eighteen persons less then 1974. There have been payroll savings of about $250,000 in the past two years.
>
> Although food costs have risen approximately 15% in the past year, the facility's costs have been stable through better management.
>
> He also indicated that the facility "can live" with a skilled nursing facility rate of $67.88 and a health related facility rate of $35.06.

The above information was not reviewed and evaluated by the Department. Facility was told to document this and if they choose to do so, to submit such to Doctor Cicero and/or the court.

1/20/77

STATE OF NEW YORK
DEPARTMENT OF HEALTH
MEMORANDUM

DEFENDANTS' EXHIBIT FF

December 16, 1976

To: Doctor Haughie

From: Doctor Furth

Subject: Loretto Geriatric Center, Inc. - Discussion With Mr. Harper Regarding Issues

1. Facility has made the cuts suggested that represent an annual cost savings of $357,700., which includes termination of the full-time Psychiatrist and one half-time clinical physician.

2. Facility does not feel that having made these cuts in expenditures that irreparable harm will be done to the patients.

3. The facility claims that the application of the 60th percentile ceiling to nursing staff costs for the nursing home and health related facility will not allow staffing to exceed 2.79 hours/patient/day in nursing home and 0.66 hours/resident/day in the health related facility. The facility has submitted information to substantiate a patient need of 3.5 hours per patient per day in the nursing home and approximately 1.3 hours per resident per day in the HRF. Health Department personnel, based upon March, 1976 survey, state that patient needs were 3.5 hours/patient/day in the nursing home and approximately 1.3 hours per resident per day in the HRF.

4. The facility states that the present Medicaid occupancy of the HRF is 91% and the nursing home is 99%.

5. The facility accepts the disallowance in 1976 projected costs of approximately $100,000 because substantial personnel reductions occurred after the cost determinations were submitted.

6. The facility requests that prompt consideration be given to rate appeals for nursing services staffing in the nursing home and health related facility as well as in the area of medical services.

2734

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---X

NEW YORK ASSOCIATION OF HOMES FOR AGING, INC., et.al., on behalf of themselves and all other nonprofit residential health care facilities which render services to Medicaid sponsored patients,

Plaintiffs,

-against-

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, and HUGH L. CAREY, as Governor of the State of New York,

Defendants.

---X

Pursuant to the instructions of the Court, staff of the New York State Department of Health met with representatives of Loretto Geriatric Ctr., Inc. (hereinafter "the facility") on December 14, 1976. In the course of such meeting the Department's staff advised the representatives of the Facility of its position with regard to proposed cuts in the operational expenses of the facility, and such representatives advised the Department's staff of their views. Following are a Findings of Fact and a summary of the respective views:

FINDINGS OF FACT:

Facility can sustain rate reductions by making substantial reductions in several areas of operation without causing irreparable harm to patient care. In addition, the findings are:

1. Based upon cost figures submitted for actual operation 1 January - 31 October, 1976, annuallized projected cost of HRF operation is $4,756,956.
2. Based upon rate of $31.94, the allowable cost for 1976 HRF operation is $3,963,754.
3. The administrator asked if he would be permitted to depart from the Department's recommended areas for cost reductions, seek his own innovative ways for achieving cost savings while still maintaining his present rating and operating within or at the cost ceilings currently imposed. The Department responded favorably in principle.
4. The reconciliation of the $793,000 presumed difference is based on the Department operational review and the following considerations:
    a. Based on facility's information, 40% of the occupancy of the HRF is not paid by Medicaid, and is assumed to be paid at a rate of $36/day from other sources. The income source other than Medicaid is approximately $220,000.
    b. Estimated cost savings determined by program review - $318,100.
    c. Previously determined non-reimbursable cost - $269,804.
    d. According to information submitted by facility, the current cost of HRF nursing staff is less

than incurred during first part of 1976. The annualized decrement in actual cost is estimated at $100,000.

Summary

1.	Loss claimed by facility	$793,000
2.	Total reductions proposed by Department	907,904
3.	Total dollar reductions accepted by facility	907,904
4.	Items of disagreement: Facility agrees total cuts. However, wishes to live within rate with their own adjustments and cuts.	

Operational Category	New York State Department of Health Comments	Loretto Geriatric Center, Inc. Comments
Food and Nutrition	1. Reduce waitresses from 20 to 6.	1. Did not accept reduction to 6, but would consider some reduction together with other innovative methodologies to achieve cost reductions.
	2. Pre-select menus.	2. No issue.
	3. Eliminate three diet technicians.	3. No issue.
	4. Eliminate three intermediate food service supervisors.	4. No issue.
	5. Re-examine food delivery system to reduce significant food waste.	5. No issue.
	Total Savings $178,750	
Social Services	Reduce from seven to one the number of individuals with master of social work (MSW) degree, while adding five social work assistants.	Took no issue on reductions; disagreed as to amount to be saved. Stated facility was able to hire MSW at $10,500, and that differential between MSW's and Assistants was $1,500, leaving amount to be saved at $18,000.
	Total Savings $27,000	

New York State Department of Health		Loretto Geriatric Center, Inc.
Operational Category	Comments	Comments
Rehabilitation Therapies	1. Reduce number of full-time occupational therapists from 4.2 to 1, and add two full-time certified occupational therapy assistants.	1. Took no issue.
Activities Program	2. Reduce activities staff from 11 to 5 by eliminating two coordinators, one secretary and three assistants. Total Savings $64,350	2. Took issue with idea of reducing numbers of highly qualified employees in activities program.
Overall Administration	Overall administrative costs ranked significantly high. Drastic cuts have to be made. No savings amount stated.	No issue.

New York State Department of Health		Loretto Geriatric Center, Inc.
Operational Category	Comments	Comments
Medical Care	Eliminate psychiatrist and other specialty services. Savings - $48,000, plus cost of undetermined amount of other specialty services.	1. No specialty services currently being provided except for psychiatric services. Facility took issue with elimination of psychiatrist because of position that psychiatrist is essential to overall patient management program.

2137

WORKSHEETS

12/14/76 Meeting

FACILITY: Loretto Geriatric Center, Inc.

IN ATTENDANCE

DEPARTMENT STAFF	FACILITY REPRESENTATIVES
Steven Steinhardt Eleanor Carey	
A. Rodriguez	Syr. R.O.
J. Terry	Cent. Office-[illegible]-LTC
EDWARD STRENT	B.H.F.F. (W.A.)
FRANK TUR[illegible]	SYR. R.O.
Margaret de Kay	Rehab Therapies - Central Off
Louis A. Cirillo	Syracuse R.O. Rehab. Therapies Activities
Nancy O'Hara	Nursing Ser. Cons. Syr. R.O.
Ruth Meek, BHNSA, SRO	Syr. R.O. Social Wkr
J R Startz	Syr RO Dietician
Linda Layua	BOFFL
FRED WIENER	
BILL GORMLEY	BRRS
DAVE CHASE	"
HANK HIGGITT	"
DAVID J. STERN	NYAHA
[illegible]	[illegible] Center
[illegible]	NYAHA

FOOD-NUTRITION

$ 178,750

Facility: Loretto Geriatric Center, Inc.

12/14/76

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name Linda Lagua Henry Higgitt)

1.	Reduce food service waitresses from 20 to 6. Pre-selection of menus.	$81,000
2.	Elimination of 3 diet technicians.	24,750
3.	Elimination of 3 intermediate level food service supervisors.	33,000
4.	Re-examine overall food service system and costs. a. Food waste (portions) b. Cost of food selection. c. Deficit operation of cafeteria-recovery of losses	40,000
		$178,750

Documentation

FACILITY POSITION

JUSTIFICATION

Testimony (name Norman Harper)

1. Disagreed with total amount of reduction. Questioned ability to establish tray service. Questioned his discretion to make less reductions in waitress service while at same time making other innovative changes producing similar savings.
2. No issue.
3. No issue.
4. No issue.

Documentation

[illegible]

UNRESOLVED ISSUES

Disagreement as to total number of waitress reductions.

COMMENTS

SOCIAL SERVICES

$ 27,000

2139 12/14/76

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name J. R. Sturtz Henry Higgitt)

Reduce number of full-time employees with master of social work (MSW) degrees from 7 to 1; replace 6 of the MSW's with social work aides.

a.	Difference between 5 MSW's and 5 aides ($3,000 each)	$15,000
b.	Elimination of 1 MSW	+12,000
		$27,000

Facility could make these reductions without affecting rating in this area.

Documentation

FACILITY POSITION

JUSTIFICATION

Testimony (name Norman Harper)

Disagreed on dollars involved. Said MSW was paid $10,500 versus $9,000 paid to aides. Resulting savings would thus be only $18,000.

Documentation

UNRESOLVED ISSUES

Amount to be realized in savings from reduction in social work employees.

COMMENTS

Facility: ____________

REHABILITATION THERAPIES   2140   12/14/76

$ 28,000

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name Louis A. Cirillo)

Reduce from 4.2 to 1 the number of full-time occupational therapists and replace with 2 full-time assistants.

Saving from eliminating occupational therapists	$45,000
Cost of adding assistants	-17,000
Net Savings	28,000

Documentation

FACILITY POSITION

JUSTIFICATION

Testimony (name Norman Harper)

No issue

Documentation

UNRESOLVED ISSUES

None.

COMMENTS

Facility: ____________

LEISURE-TIME ACTIVITIES

2141 12/14/76

$ 64,350

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name Louis A. Cirillo)

Reduce number of activities staff from 11 to 5.

2 Coordinators	$24,200
1 Secretary	8,800
3 Assistants	31,350
Total Savings	$64,350

Documentation

FACILITY POSITION

JUSTIFICATION

Testimony (name Norman Harper)

Took strong issue with this reduction. Says facility searched extensively for highly qualified activities program personnel. Said reduction of numbers of highly qualified personnel would be devastating to HRF.

Documentation

UNRESOLVED ISSUES

Whether Activities Program could be run with reductions as proposed.

COMMENTS

ADMINISTRATION AND GENERAL 2142 12/14/76

$________

DEPARTMENT CUT RECOMMENDATIONS

Justification

David Chase
Dr. Frank Furth
Testimony (name James Tunny)

Overall administrative costs are excessively high; there is need to make drastic reductions. Facility is ranked number one in area of administrative costs with regard to facilities of comparable size. No specific reductions proposed, but significant amounts can be realized.

Documentation

FACILITY POSITION

JUSTIFICATION

Testimony (name Norman Harper)

Acknowledged need to reduce costs in this area.

Documentation

UNRESOLVED ISSUES

Exact dollar amount and specific areas to be cut.

COMMENTS

: MEDICAL CARE 2143 12/14/76

$ 48,000

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name Dr. Frank Furth)

All non-specialty services should be placed on fee-for-service basis. Not necessary to maintain salaried staff to provide these services.

Savings $48,000

Documentation

FACILITY POSITION

JUSTIFICATION

Testimony (name Norman Harper)

No specialty services are currently being provided except for psychiatric. Took issue with proposal to eliminate psychiatrist position, stating psychiatrist is essential to overall management of patient program.

Documentation

UNRESOLVED ISSUES

Replacement of psychiatrist by comparable community resource on fee-for-service basis.

COMMENTS

MEDICAL CARE 2144 12/16/76

$__________

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name__________)

Paying Medical Director $53,000/year
Facility claims:

$42,000 + Salary
11,000 fringes package

Fringes should be shown as fringe benefit and would not apply to the current $40,000 ceiling for Medical Director's salary.

Documentation

None

[illegible]

FACILITY POSITION

JUSTIFICATION

Testimony (name__________)

Accepts.

Documentation

UNRESOLVED ISSUES

COMMENTS Facility claims they plan to terminate the two physicians (admission and annual examination physician and the psychiatrist).

NURSING ADMINISTRATION,

12/16/76

2145

$ REGISTERED NURSES, AIDES, AND ATTENDANTS

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name ______________)

The 1976 statement annualized included $907,783 for nursing in the HRF.

The cost shown on the appeal for nursing showed $804,941. Our position therefore is that the actual level of nursing in the HRF is $804,941 due to reductions already made for a net savings of $100,000.

Documentation

FACILITY POSITION

JUSTIFICATION

Testimony (name ______________)

Accepts.

Documentation

UNRESOLVED ISSUES.

None

COMMENTS

OTHER

$__________ 2146 12/16/76

DEPARTMENT CUT RECOMMENDATIONS	FACILITY POSITION
Justification	JUSTIFICATION
Testimony (name__________)	Testimony (name__________)
Private Pay Patients - Since 40% of the residents in HRF are other than Medicaid, the income from those residents has to be considered in the calculation of loss.	Facility claims if a patient or resident was private pay for any part of the year, they were listed as private pay. Claims currently only two patients in SNF are private patients, and only 31 of ICF patients are private pay. (1.6% SNF patients and 9% of HRF patients)
Documentation	Documentation

UNRESOLVED ISSUES

Extent to which private patient income may be used to offset operating expenses of facility would depend on current private patient population which facility states is less than that estimated by Department.

COMMENTS

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

-----------------------------------x

NEW YORK ASSOCIATION of HOMES for AGING, INC., et al.,

Plaintiffs,

-against-

PHILIP L. TOIA, as Commissioner of SOCIAL SERVICES of the STATE of NEW YORK, et al.,

Defendants.

-----------------------------------x

76 Civ. 5113

New York, New York
February 28, 1977 - 2:30 p.m.

BEFORE:

HON. THOMAS P. GRIESA,

District Judge

APPEARANCES:

PROSKAUER, ROSE, GOETZ & MENDELSOHN, ESQS.
Attorneys for New York Association of Homes
BY: JEFFREY A. MISHKIN, ESQ.

LOUIS J. LEFKOWITZ, ESQ.
Attorney General, State of New York
BY: GEORGE C. MANTZOROS, ESQ.

THE COURT: Let the record show on February 23rd Mr. Mishkin wrote me, asking among other things, for an injunction pending the appeal and my office advised him that this application should not be made by a letter but it should be in some other manner. The lawyers are before me, Mr. Mantzoros and Mr. Mishkin are before me with formal papers. It is an order to show cause dated today and returnable today but I think the parties understand that it is somewhat of a formality. So, I will endorse it.

You have been served, Mr. Mantzoros, haven't you?

MR. MANTZOROS: Yes, I just received it about five minutes ago.

THE COURT: I will endorse it. Motion denied.

One thing I would like to ask is this: at the conclusion of our last hearing there were or there was a discussion of further administrative proceedings and inquiries to be had with regard to Loretto and Mary Manning Walsh. I indicated that I would be receptive to any further hearings that anybody wished to have.

I have never been requested to have a further hearing. I wish the record to reflect that. Thank you very much.

MR. MANTZOROS: We have responded to this Court's request on the recent approvals by the division of the budget on the applications.

THE COURT: Well, that's in letter form.

MR. MANTZOROS: I certainly can put it in affidavit form for the record.

THE COURT: I think you ought to file an affidavit and indicate the significance of it. Just the naked figures, they have got to be put in context and I think it should be made a part of the record as to what the significance of it is with regard to what is requested, what has been requested, what relation it has to the pre-November 1 rates and so forth, what relation you regard it having as to the amount of the loss.

The point I want to make clear, I stood ready to deal with any specific problem. I don't know whether an exchange of affidavits will raise problems or reduce problems. I have no idea. You are entitled to file papers if you wish. And the plaintiff is entitled to file papers. But the point is I stood ready to have further hearings on those two homes. I was never asked for any further hearings and that's the way the matter now stands. That's that as far as I am concerned as of the present moment.

I would like to raise a further matter which I really don't want to go into in any detail. One thing I did not specifically mention in my order denying preliminary injunctive relief for the class as a whole and that is this question of retroactivity.

Now, the matter of retroactivity was never pressed before me because I was satisfied and I think it was implicit in our proceedings, if not explicit, that for the moment until further notice there would be no action taken by the state to collect amounts allegedly retroactively due from January 1 to October 31, 1976.

Am I wrong in my assumption?

MR. MANTZOROS: If your Honor please, I think you are correct and as a matter of fact I think the words that were used and the Second Deputy Commissioner, Dr. Frank Cicero may have mentioned and it may have been off the record and I recall the word "stretch out," but not now at this particular time.

THE COURT: And without further notice. The position I believe the case is in, unless there is further notice to me, there will be no attempt to enforce the retroactivity.

Thank you very much.

MR. MANTZOROS: It was not a definite date that they purport to say that it was not until ten. The only other one open is Plaza and they are working on it now. We will report to this case as soon as the final report comes in on that appeal.

THE COURT: Thank you very much.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

--------------------------------x

JOSEPH BULLA, et al.,

Plaintiffs,

-against-

PHILIP L. TOIA, et al.,

Defendants.

--------------------------------x

76 Civ 5113
77 Civ 472

New York, New York
February 28, 1977

B E F O R E:

HON. THOMAS P. GRIESA,
District Judge

APPEARANCES:

STEPHEN JACOBY, ESQ.
Attorney for Plaintiff Bulla

PHILLIP GASSEL, ESQ.
Attorney for Legal Services for the Elderly Poor, Plaintiffs

JEFFREY MISHKIN, ESQ.
Attorney for New York Association for the Aging

SOL SOKOLSKY, ESQ.
MICHAEL H. BARNETT, ESQ.
Attorneys for Beth Abraham Hospital

LOUIS J. LEFKOWITZ, ESQ.
Attorney General for the State of New York
Attorney for Defendants
BY: CHARLES A. BRADLEY,
Assistant Attorney General

ALSO PRESENT:

New York State Health Department:
DR. DONALD DAVIDOFF
ESTELLE WAHL
DR. GLEN HAUGHIS

Beth Abraham Hospital:
WILLIAM H. FROHLICH
BERT SHAW

(In open court.)

MR. JACOBY: Your Honor, Stephen Jacoby for the plaintiffs in Bulla versus Toia.

On February 18th, your Honor denied preliminary class relief to the plaintiff class in this case, but you indicated you would accept case by case requests for preliminary relief. We are here today to present the urgency of such--urgent need for such preliminary relief for the patients in Beth Abraham Hospital, which is a skilled nursing facility. Three of the named plaintiffs are patients in that facility.

To facilitate this hearing and for the convenience of the Court, I have asked Mr. Sokolsky, attorney for Beth Abraham, who is most familiar with the witnesses to be examined, I would like to point out that the objective here is to concern ourselves with the effects the cuts will have, the cuts in services will have on the health and lives of the patients and why that makes it urgently necessary that there be preliminary relief--

THE COURT: Before we get that, let's get our finances straight. Who knows about the finances?

MR. JACOBY: Can I ask Mr. Sokolsky to take over at this point?

MR. SOKOLSKY: Your Honor raises an interesting point. I had intended to give your Honor a few remarks on the order of proof. We have here today the administrator of the hospital who will testify about the financial impact on the cuts in services. I also have here today the medical director, the attending physician and the nursing director who are prepared to testify about the impact of the diminution of services.

I was going to ask your Honor for some flexibility in the order of proof for the following reason, including the lateness of the hour. If the proceeding is incomplete today, I really have little difficulty and none at all in bringing ba back the adminstrator of the hospital. But I hesitate, if I can avoid it, to ask to recall the medical personnel whose time is needed at the facility.

THE COURT: I take it the basic thing is the finances. We have to get to that immediately.

MR. SOKOLSKY: Are we ready, your Honor?

I call Mr. Frohlich to the stand.

MR. JACOBY: I will make one point and then I will sit down. It is our feeling in the Bulla versus Toia case we are not dealing specifically with money. We are dealing with reduction in services. We are not claiming that the patients have a right to a specific number of dollars, but rather to specific services that they are entitled to notice when such services are to be reduced.

THE COURT: We will proceed though with the administrator.

Wait a minute. This proceeding is in the two cases, is it not? Because I have affidavits in 7675113, the Homes case and I have affidavits in--yes, I have an affidavit and I assume they are virtually identical in the two cases, 76 75113 and 77 7472.

MR. JACOBY: It is my understanding, having spoken with your clerk, that the specific hearing today was to deal with the requests for preliminary relief within the context of the Bulla case.

THE COURT: Why did you file two affidavits? Who arranged to give me two affidavits in two cases?

MR. SOKOLSKY: Well, your Honor, we have prepared them in both cases but we have not been asked to attent a hearing yet in the Association case. From my point of view, it matters nothing to me whether the hearing is in one case or two cases, because they will be the same.

However, I understand--

THE COURT: Do you represent Beth Abraham?

MR. SOKOLSKY: Yes, I am Mr. Sokolsky.

THE COURT: Which case do you represent Beth Ab Abraham in?

MR. SOKOLSKY: We will represent them in both cases. They are a member of the plaintiff class in the other case but not of the plaintiff class in the case before your Honor.

THE COURT: So, your client has standing in the 76 75113, right, what we call the "Homes" case?

MR. SOKOLSKY: Yes, your Honor We have standing as a party. Here we are offering ourselves only as witness at the request of the patients.

THE COURT: I think that's clear enough. Let's proceed.

WILLIAM H. FROHLICH, called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SOKOLSKY:

Q Mr. Frohlich, state your address.

A William H. Frohlich, 31 Sycamore Road, Scarsdale, New York.

Q By whom are you employed?

A Beth Abraham Hospital.

Q What is your title?

A Administrator.

Q What is your educational background?

A Masters in Public Administration, New York University.

Q Mr. Frohlich, in response to a request by the Court in a related action, did you attend a meeting with representatives of the Department of Health in Albany?

A Yes, I did. On January 19, I attended a meeting in Albany, I believe they are called management assessment meetings. I think that was as a result of the action in what was referred to as the "Homes" case. We had a meeting. I was there with my Director of Nurses, Assistant Director of Nurses, myself, the executive director and the associate administrator.

Q Who was present in behalf of the Department of Health?

A The meeting was chaired by I believe Mr. Friedland.

THE COURT: When was the meeting, again, please?

THE WITNESS: January 19, 10 a.m. Mr. Friedland chaired the meeting for the New York State Department of Health and also present were several surveyors from the department and from the New York City office, specifically Dr. Mischner --

THE COURT: I wonder if we can get the basic facts before we get into this. According to your affidavit, the old rate before November 1 was $65.96, right?

THE WITNESS: Correct. It was $66 prior to November 1.

THE COURT: Now, do you have one class of patients?

THE WITNESS: Yes, I do.

THE COURT: How long has your home been operating?

THE WITNESS: Approximately fifty years, but I don't have an exact date for you.

THE COURT: According to your affidavit, there was an operating deficit from January 1, 1976 through October 31 for that period of $240,105, right?

THE WITNESS: I brought with me the affidavit. I am trying to get the right page, if you give me a moment. That is correct.

THE COURT: Now, is this a situation where you have any mortgage payments that you --

THE WITNESS: No. There is a depreciation amount owed of two dollars in our rate. It was our rate of 66 includes a two dollar depreciation.

THE COURT: Have you obtained any financing?

THE WITNESS: No, not the way some of the other homes may have a large amount of money in the mortgage, no, sir.

THE COURT: Do you have any loan from any state agency at all?

THE WITNESS: No, sir.

THE COURT: Were you in arrears as of October 31, 1976 on any accounts payable or on any notes or were you in arrears on anything?

THE WITNESS: Yes, I was, your Honor.

THE COURT: What were you in arrears on?

THE WITNESS: We have had to because of decreased cash flow coming in delay the paying of our vendors to the maximum. Some may be in arrears sixty days.

THE COURT: Do you know what it was as of October 31, do you have any idea of the delinquency?

THE WITNESS: No, I would not. I would be guessing.

THE COURT: But there were delinquencies?

THE WITNESS: Yes. I can give you a couple of examples but no specific dollar amounts. I had been summoned to arbitration proceedings prior to this particular time because --

THE COURT: You mean prior to October 31?

THE WITNESS: Yes. Because I had delayed payments in union benefit -- to union benefit funds because of a cash flow problem. When you do so, you get arbitration hearings as a result of that. That happened with both unions, 1199 and the SNA.

THE COURT: Who else have you been arrears to?

THE WITNESS: I have been arrears to several of my vendors but I would have to go back and research to give you specifics.

THE COURT: Do you have any indebtedness, any bank loans or anything like that?

THE WITNESS: I have a bank loan. I did not at that point have a bank loan. I have a bank loan now of $100,000.

THE COURT: When did you take that out?

THE WITNESS: Early in February.

THE COURT: What are the terms of that loan?

THE WITNESS: It is 6-3/4 percent.

THE COURT: Is it demand or what is it? Is it payable when?

THE WITNESS: It is a three-year loan. At the same time, your Honor, I opened up a line of credit for another $100,000 because my feeling is I am going to need that also.

THE COURT: At the bank?

THE WITNESS: Yes, sir. That's Manufacturers

Hanover.

THE COURT: Is your fiscal year December 31?

THE WITNESS: Yes, it is.

THE COURT: Now, your rate beginning November 1 was what?

THE WITNESS: Beginning November 1 my rate was $59.47.

THE COURT: Now, your affidavit listed a deficit for November and December $142,930.

THE WITNESS: Yes.

THE COURT: Now, would you be able to tell me this. If the pre-November rate had remained in effect for November and December, what difference would that make? In other words, the relief sought in this action is to restore the November -- the pre-November 1 rate. I need to know what difference it would make. You are already losing money.

MR. SOKOLSKY: May I address myself to that issue, your Honor? The gravamen of the argument of Beth Abraham is not that its doors will close.

THE COURT: I want to know the facts. It is very late in the day. Can you answer my question?

THE WITNESS: Yes, I can.

THE COURT: What is the answer?

THE WITNESS: If my rate were restored to the pre-November 1 rate of $66 a day, there is for 1976 -- wait. I have got to understand the question specifically. What would have happened for the whole year or what would have happened for those months?

THE COURT: Just for the two months.

THE WITNESS: I would have been in adequate financial condition.

THE COURT: You would have been in an adequate financial situation?

THE WITNESS: I would have been in an adequate financial condition.

THE COURT: That is not my question. You were losing money for the period January 1 through October 31, $240,000; right?

THE WITNESS: Yes, right, that's the annual period. If I can explain, I think I can make it clear. I had instituted lay office earlier in the year, staff lay office, which in conjunction with economies that we have made in the institution, would have allowed me at that point to operate at $66 a day for the last two months of the year. That would have met my financial needs.

THE COURT: On that kind of generalization, I am not too satisfied with. Isn't it possible to calculate specifically what your profit or loss in dollars would have been for November and December if you had had a rate of $66?

THE WITNESS: Your Honor, my controller is sitting in the back.

THE COURT: Can he do it? Can you stand up here and come up here. Are you the controller of Beth Abraham?

A VOICE: I am.

THE COURT: Raise your hand and take an oath.

BERT SHAW, called as a witness, being first duly sworn, testified as follows:

EXAMINATION

BY THE COURT:

THE WITNESS: The end of December of this year we would have had a $205 758 deficit.

Q What would have been the results for the end of November and December?

A $9410 deficit. $23,797 surplus for November and December, $10,548 surplus if the rate remained at $66.

Q Give me those figures.

A If the rate remained at $66 per day for the month of November we would have had $23,797 surplus and for the month of December, $10,548. This is all pre-audit.

Q Of course.

And instead you are saying you had a deficit of

$142,930 for those two months?

A Right, if the rate goes down to 49.47 which it is.

Q 59.47.

A 47. The new rate, November-December rate is 59.47 as compared to 66.

Q And with that 59.47 rate you would have a $142,932 loss for November and December; is that right?

A The month of November is $65,583 and December, 77.347.

Q Now, have you got the year-end statement?

A It is not audited yet.

Q Can you tell me what your situation was as of the year-end -- are you aware -- what I want to know is what about the delinquency on accounts payable and so forth.

A The dollar amounts I don't have. But we are approximately sixty days behind paying the vendors.

Q What were you as of October 31?

A About 45 days, your Honor.

Q As of December 31, you are about sixty days?

A Correct.

Q Just give me an unaudited figure for the accounts payable as of December 31.

A It would be -- you want the payroll figures in that as well as the taxes that are due?

Q Well, is that an account payable?

A Taxes --

Q How do you have it?

A Taxes are an account payable.

Q How do you have it listed on your financial statements?

A Tax payable. It would be roughly close to a million dollars. The exact amount I'm not sure.

Q What about of that is sixty days old?

A About 580 to 600 thousand dollars.

WILLIAM H. FROHLICH, resumed.

EXAMINATION

BY THE COURT:

Q Let's go for the rate after January 1. I take it that the state has approved a rate of $61.93, right?

A Yes.

Q What does that do to your profit or loss, can you give me an idea?

A For the year '77?

Q Well, you made a projection?

A We have a projected loss for the year 1977 of $1,307,536.

Q One million what?

A $307,536.

Q Why is it so big?

A The projected deficit for the quarter is $326,884. I am multiplying that by four for the year.

Q Why is it so much bigger?

A Because 1977 takes into account increases that were not taken into account in 1966.

Q What are those increases?

A As of January 1, I have a 4-1/2 percent increase for the 1199 employees.

Q What is that?

A That is Local 1199, Drug and Hospital Employees Union.

Q What do they do?

A That's all of my service, maintenance, nurses aide, the bulk of the employees of the institution. The dietary department, my housekeeping department. I have another contract with the State Nurses Association that has a 4-1/2 percent increase which is also calculated into this.

Q So, your nurses are going up 4-1/2 percent?

A Also 4-1/2 percent, effective January 15.

Q When will the service employees increase go into effect?

A That was January 1. That went into effect earlier.

Q What other increases?

A Well, let me follow that one through for a moment. The 1199 has a contract wage reopener in July which is an amount unknown. So, my projected figures don't even include what that contract wage reopener will reflect. I also have a projected six percent increase in the cost of goods and services for the year, 1977, which raises --

Q What is that?

A Six percent. Increase for goods and services, light, heat, power, telephone, cost of food, coffee.

Q Let's take the first quarter. I think there may be some review of rates after March 31, isn't there? Right, Mrs. Wahl?

MRS. WAHL: Yes.

Q Do you project this six percent increase for goods and services immediately through the year?

A The rate is projected for the year but it is reflected in my quarterly statement at six percent increase in that quarter.

Q What else makes up the 326,000, I guess the reduction of rate?

A Yes. That's a large part.

Q Then what else?

A Can I defer to Mr. Shaw for any additional numbers?

Q Suppose the rate were restored to $66, what effect would that have on your projected 326,000 loss.

THE COURT: Mr. Shaw?

MR. SHAW: I don't have that worked out, your Honor.

THE COURT: Can you work it out quickly?

MR. SHAW: Yes.

A There is a calculator in the back.

MR. SOKOLSKY: Your Honor, while that is going on, may I make a remark about what we intend to prove today. Really what the state is willing to stipulate. I just requested a stipulation of Mr. Bradley and he has agreed to do it. What I asked him to stipulate is that the state's position is that the reduction in reimbursement rates will cause a reduction in the nursing staff of thirty nurses aides and orderlies, 7.7 supervisors and will require the conversion of 65.8 registered nurses into licensed practical nurses. This much isn't even in issue. I was about to adduce testimony that at the meeting in Albany they requested that staff reduction. What I really want to prove is the consequences of that undisputed reduction.

THE COURT: We will take that in a minute.

(Pause)

MR. SHAW: The deficit would go to $710,000, approximately.

THE COURT: For the quarter?

MR. SHAW: No, for the year.

THE COURT: I want to know for the quarter.

While we are waiting for that, maybe we can make some headway for something else. What is here for the Department of Health?

MR. BRADLEY: Your Honor, we have Mrs. Walsh who I am sure you know well. We have Donald Davidoff who is Commissioner for health and care standards. We have Glen Haughie.

THE COURT: I am going to treat Mrs. Walsh and Mr. Davidoff as still under oath.

Do you understand that, Mrs. Walsh and Mr. Davidoff?

Mr. Haughie is from where?

MR. BRADLEY: With the Department of Health.

THE COURT: Now, we have affidavits, Mrs. Walsh and Mr. Davidoff and Mr. Haughie, or an affidavit indicating that to break even with these new rates there would have to be subtantial reductions and changes in the nursing staff.

I think that it was stated by this gentleman, Mr. Sokolsky, that it is virtually agreed that there would have to be reduction of 7.7 supervisors, thirty nurses aides and orderlies and the conversion of 65.8 registered nurses to licensed practical nurses; is that right?

MR. SOKOLSKY: That is correct, your Honor.

MR. BRADLEY: May I interrupt for just a moment. This affidavit was received by our office sometime on the 25th. It did not get to my desk until this morning. The train from Albany was late and the witnesses from Albany did not arrive here in the building. They were supposed to meet me here until 3:30. They didn't get here until approximately 5 o'clock. They haven't had an opportunity to go over the figures and I haven't had an opportunity to go over those figures with them. Also --

THE COURT: The 25th was Friday.

MR. BRADLEY: Yes.

THE COURT: I really think that somebody could focus on this between Friday and Monday afternoon. Now, I am going to go ahead with my questions, if you don't mind. I must assume that these people have a little background in this and if they don't, I will be rather surprised.

Now, what about these changes in the nursing staff?

MR. DAVIDOFF: Sir, I better point out something is wrong with my hearing. I have got some kind of inner ear infection so I am not hearing you correctly, please forgive me.

This was Beth Abraham, it was one of the facilities identified in the other class action as one of those most seriously harmed by the new rate structure. Therefore, we conducted one of the management assessments which we discussed and described for you previously. This is a 504-bed skilled nursing facility. It is not a mixed facility. We concur completely on that. We concur with the numbers about the interim rate and the number about the November 1 rate, the number about the January 1 rate. There is no question about those numbers.

THE COURT: You mean the losses and so forth?

MR. DAVIDOFF: The rates themselves as quoted and the general parameters of the losses, we are sure are substantially correct. We have no quarrel with any of that, we did conduct a management assessment in Albany at the request of the class plaintiffs and we did identify by our process a substantial amount of savings that could be incurred in our departmental professional judgment without impairing the basic nature of the care needed for the kinds of patients in the facility.

The analysis conducted in this case was identical to the analysis conducted in the others. The difference is one of degree because we found by using the same technique that we did previously that the facility could, without impairing the basic quality of the care rendered, make cuts in the magnitude of almost $3 million, two million eight by our analysis, which --

THE COURT: Per year?

MR. DAVIDOFF: On an annual basis. The majority of which of course would come from the reductions in salary expense. We found that the numbers and the staff changes you referred to which are recited in the affidavit would indeed effectuate the kinds of savings that were needed.

MR. SOKOLSKY: Your Honor, may I address myself --

THE COURT: Just a moment. Now, I am told or the affidavit indicates that in March, 1975 there was an appeal about rates by this home and certain people called Health Department surveyors conducted an inspection and recommended that under the Department of Health guidelines the home should increase its registered nurse staff by 63 positions. I am also told that no action was ever taken on that appeal. What about that?

MR. DAVIDOFF: The first part of that statement is completely correct. Our survey people did indeed say that

63 additional nursing personnel were needed. However, the second part of the statement that no action at all was taken on the appeal is inaccurate rather than incorrect. In that, there was a series, a lengthy series of meetings both in Albany and in New York City where an incremental attempt to add the staff of that 63 was made by the home, a very honest effort, I might add.

THE COURT: Say that again.

MR. DAVIDOFF: A very honest effort over those months was made by the facility to add staff but in a framework so that they didn't go out and hire 63 additional people at a large expense and not have the cash flow for Medicaid to relate to that new expense.

THE COURT: What was the nature of this appeal, an attempt to get more rates or was it --

MR. DAVIDOFF: Yes, primarily because of the 63. Primarily because we told the survey people in 1975, told the facility that as good as it was and indeed it is, it was a fine facility, they needed to hire 63 additional staff.

THE COURT: But what was the nature of the appeal that this related to? Was it a deficiency found by the Health Department or was it a request for increased rates or what?

MR. DAVIDOFF: The appeal was generated not because the Department found a deficiency in the true technical sense of the word, but because the Department mandated notwithstanding no deficiencies, that 63 additional staff be hired.

THE COURT: All right. Now, were they supposed to do this without new rates?

MR. DAVIDOFF: They are not.

THE COURT: What?

MR. DAVIDOFF: They are not supposed to be able to do that without additional funds.

THE COURT: So, they were told to hire 63 new people and not give them additional rates?

MR. DAVIDOFF: No, sir. This was in 1975. I hope that the state of our art is much progressed since then. But they were told to hire 63 people and as was the case with every other facility, they said the rates we now receive do not permit us to do this additional thing. If we are assured of additional funding, we will go forward with this requirement. That was the kind of appeal we had and there were many such for many facilities.

THE COURT: But where was it left? Did they go out and hire new people?

MR. DAVIDOFF: Very partially. My understanding -- and I am certainly subject to correction -- that in the neighborhood of eleven or twelve of the 63 were in fact hired.

THE COURT: Well, was that a correct finding or wasn't it? By the surveyors.

MR. DAVIDOFF: Your Honor, the very best and most honest answer I can give you in 1977 is that that was an improper finding.

THE COURT: When was it found to be improper?

MR. DAVIDOFF: It was found to be improper within the context of the programatic financial problems that the State Department finds itself in in 1976 and 1977. I might point out, sir, that in 1975 at the very time that our staff was required to hire 63 people, there were no deficiencies listed at this facility.

THE COURT: So, you are saying it is improper and you also state budget problems?

MR. DAVIDOFF: And also in view of our current professional attitudes about long-term care.

THE COURT: What are they?

MR. DAVIDOFF: They are that although it would be very desirable in a different world to have an extremely high level of care for all patients that need it, we must all be satisfied, including the patients themselves, with adequate care and we must abandon our ideas, although reluctantly, about super care.

THE COURT: Can you give me a second to answer a phone call.

(Pause)

THE COURT: Mr. Shaw, did you calculate the first quarter figure?

MR. SHAW: Yes, I did. $194,500 for the first quarter, '77.

THE COURT: Let me get that.

That is, if the previous November 1 rates were restored?

MR. SHAW: Right.

THE COURT: The loss would be what?

MR. SHAW: $194,500.

THE COURT: Say that once more.

MR. SHAW: $194,500

THE COURT: All right. Well, we have got the age-old question here of how to make an intelligent reconciliation between two very much different views of how this home ought to operate.

Now, the plaintiffs in the patients' case come in here and they say there are some of those provisions that were not complied with and that raises a question of law which we have not resolved.

But certainly the change in care affects them.

How much would it cost per month to restore the pre-November 1 rates to this facility? What is the cost?

MR. DAVIDOFF: Your Honor, it would be approximately $50,000 a month, using four dollars per day times the number of Medicaid days.

THE COURT: Wait a minute. Let's be a little more precise. If we take -- in other words, you are saying the difference between the January 1 rates and the old rates is your four dollars, right?

MR. DAVIDOFF: Yes, sir.

THE COURT: About 50,000 a month?

MR. DAVIDOFF: Yes, sir. There are about 14,000 Medicaid days per month, roughly.

THE COURT: Can you give me an idea of what the difference would be for November and December?

MR. DAVIDOFF: That would be six dollars times the same patient days. So, it would be about 85,000.

THE COURT: 85,000 a month?

MR. DAVIDOFF: Yes, sir.

THE COURT: When did you tell them that they should reduce the staff so that they could save this money over and above the savings they had carried out voluntarily? When did you tell them that?

MR.DAVIDOFF: Sir, that was only within the context of the management assessment.

THE COURT: That management assessment, they were advised of the results of that when?

MR. DAVIDOFF: At the meeting in Albany that was testified to.

THE WITNESS: January 19, sir.

MR. DAVIDOFF: Yes, in January. I have no doubt it is the 19th.

THE COURT: Now, Mr. Davidoff, we come to this problem as a practical problem. A nursing home is going along and they have made certain reductions in staff. They have also been told by the State of New York that they should add 63 registered nurses. Now, they haven't been told, to my knowledge, that it would be a good idea to cut the registered nurses or change the registered nurses to licensed practical nurses and so forth?

MR. DAVIDOFF: They have not been told that, sir.

THE COURT: They were not told this as of November 1 to my knowledge.

MR. DAVIDOFF: That's correct.

THE COURT: Okay. Now, all of a sudden you cut the rates with practically no notice. What are they supposed to do? They are getting $85,000 a month less for November and December, given no notice virtually. I don't see that they can turn around on November 1 and make all these cuts. I don't see how anybody can be expected to do anything to suddenly save $85,000. What is somebody supposed to do?

MR. DAVIDOFF: The points you just stated are the dilemmas we faced in each of these cases.

THE COURT: Right, and it is a very serious dilemma.

MR. DAVIDOFF: I agree. Our response to those earlier questions that we have discussed here and have worked with even without discussion here, had then substantial effort on behalf of those other plaintiffs to make major revisions permitting us then to review on an in-depth patient analysis as we did in other cases.

THE COURT: Like Loretto?

MR. DAVIDOFF: Like Loretto and like Mary Manning Walsh. We do not find, your Honor, any effort of a significant nature to so to speak meet us halfway at all. The facility in this case has said so far, as I understand it, that the level of care needed is right the way it is right now and they cannot make cuts, except perhaps $100,000 in nutrition. Out of all the two million eight we recommended, their position I believe is that it is only possible perhaps to cut $100,000 in nutrition. And in that context, even recognizing fullwell it is impossible to turn around as quickly as it appears we are attempting to do. We find that for certainly good reasons that this facility is different from the others we have been working with and has not made the effort, we think it is necessary to make these cuts to permit us to see an effort to turn around the system that needs to be turned around.

THE WITNESS: Your Honor, I could comment on that if you want.

THE COURT: Okay.

THE WITNESS: Let me comment on it and take it into a little historical perspective and let's deal with last year.

I started last year looking at my reimbursement rates at a frozen rate and the frozen rate, what with the cost of goods and services and mandated increases --

THE COURT: If you want to come up, Mr. Davidoff.

MR. DAVIDOFF: I can hear that.

THE WITNESS: What we did in 1976 was to assess the staffing patterns at the institution. In February and March of 1976 I laid off or froze the jobs of or by attrition approximately forty workers, scattered throughout the institution. My intent at that time and my intent now is to reduce not in my nursing and medical services but to reduce in other than direct patient care services.

THE COURT: You mean you have further reductions in mind.

THE WITNESS: I did today, your Honor.

THE COURT: What did you do?

THE WITNESS: I laid off fifteen people in the dietary department today and I had to stop the negotiations with 1199, with the union in order to come down here. I am going back tomorrow at 9:30. I gave notice --

THE COURT: You have to negotiate with the union in order to lay people off?

THE WITNESS: It is a little complicated. But management usually has one position and the union has a different position.

THE COURT: Do they have to agree to the layoffs?

THE WITNESS: Technically no, they don't have to agree to the layoffs. But they can make it very difficult for me if they feel the layoff was done in an arbitrary and caprecious manner. Last year when I laid off people in the housekeeping, I laid thirteen people off in housekeeping and I had a one-day strike.

THE COURT: Maybe you can ask the union to come down here if they give you any problems on it. It seems to me you ought to have the discretion under these circumstances to make your layoffs. So, I would like to hear from the union if they have got any problem or give you any rough time. How much will the fifteen layoffs save?

THE WITNESS: The fifteen layoffs will bring me down the $100,000 that Mr. Davidoff --

THE COURT: 100 per year?

THE WITNESS: 100,000 per year which Mr. Davidoff discussed per year which will bring my dietary costs down to the ceiling level that the state has mandated in its --

THE COURT: What about the nurses?

THE WITNESS: In December, I was faced before the rates were revised upward slightly with a deficit in nursing of well over the $400,000 that I am faced with right now in nursing.

THE COURT: I don't understand what you mean, dificit in nursing.

THE WITNESS: The way the reimbursement mechanism has been developed, you are dealing in specific categories. And I am dealing with my nursing category as one. Let me follow that example through. I am grouped with other institutions of 300 beds and over for purposes of reimbursement. That includes some proprietaries and some voluntaries. Of that group, let's take the nursing costs for example. I am ceilinged at the 60th percentile of the group average in nursing. Whatever is above that group average is ceilinged to my rate. That amounts to $404,000 in my nursing category.

MR. DAVIDOFF: That is substantially --

THE COURT: Read the last part.

(Record read.)

THE COURT: In other words, your nursing costs are $404,000 over the ceiling per year?

THE WITNESS: That is right.

THE COURT: That was as of when, last year?

THE WITNESS: My January 1 rate, yield me an over-ceiling of $404,000 in nursing after I had --

THE COURT: You mean your nursing costs are more than ceiling?

THE WITNESS: Yes. You have to bear in mind that on December 4, I laid off fifteen, fourteen nursing aides and orderlies.

THE COURT: When did you do that?

THE WITNESS: December 4. I can tell you that as a result of that --

THE COURT: How many did you lay off?

THE WITNESS: Fourteen.

THE COURT: Fourteen what?

THE WITNESS: Nursing aides and orderlies. These are the people who deal with the direct nursing patient care. As a result, we have kept statistics and there is an increase in the number of skin ulcers to patients that are forming on my patients now. We have kept the figures on that. Miss Mackey, my director of nurses, is here and she can attest to that. The Beth Abraham patient population is totally different than the population of the average nursing home. It is a very sick patient population.

THE COURT: Let me ask you, Mrs. Walsh and Mr. Davidoff, I remember back in the early days of this case we discussed the 60th percentile and so forth. Now, if I remember, the concept of having or taking some kind of an averaging or a ceiling or a percentile was not new as of November 1. The concept has been in place before that, right?

MR. DAVIDOFF: Right.

THE COURT: Now, that brings up a sticky question. What do you do when people have costs that are over the ceiling and they feel very strongly that they are in a special category and it is unfair to them to restrict them to some averaging. Now, it could be in this case that there is a reason why Beth Abraham is having nursing costs over some 60 percentile or 50 percentile and it is a matter of logic, one could imagine that that could be so. In other words, if nursing costs differ from home to home, I suppose you can say one reason they differ is because some are extravagant but there also might be some absolute necessities. How do we know? Just because they are over the percentile doesn't really mean that it is all that bad, does it?

MR. DAVIDOFF: No, sir, it does not.

THE COURT: In other words, if you find -- I think we were also told that if for any reason the Department of Health found that there was a legitimate need to go beyond that ceiling, it could do it, right?

MR. DAVIDOFF: Absolutely.

THE COURT: Now, the question is whether there is a legitimate need, and I don't know the answer to that because I am not there. But we are beginning to get some evidence and he says the number of ulcers are increasing. There is an affidavit from a Dr. Shapiro, the Medical Director, that says they are at an absolute minimum and patients will die if the care is reduced. That is the evidence before me. They presumably have some knowledge of what's going on. Have you really made a sufficient review of that facility to know that these cuts you are suggesting can legitimately be made?

MR. DAVIDOFF: Your Honor, just as in the earlier cases we dealt with, we did this management assessment, part of which requires a patient assessment as well. I cite to you an example again of Mary Manning Walsh where we went in and looked at each patient. Beth Abraham has an extremely high percentage of extremely ill people. A visit to the facility -- and I have gone there myself -- will reinforce that in a moment. Our position today is that the total operational component of their rate, and as you addused from the witness earlier they have a low capital component compared to other large facilities that tend to care for the sicker patients. Their capital component is in the ballpark, with the other facilities -- excuse me, sir. Their operational component is in the ballpark with facilities that tend to care for sick patients of this sort.

THE COURT: What do you mean, the operational component?

MR. DAVIDOFF: That's carving out the debt service of the depreciation piece.

THE COURT: What do you mean, what am I supposed to understand? You say the operational component in the ballpark, is that good or bad?

MR. DAVIDOFF: In our opinion it is good and very significant that they are one of the highest, as far as Medicaid rates are concerned, one of the highest in the entire state in an operational component of rate that we believe --

THE COURT: One of the highest in the state?

MR. DAVIDOFF: Yes, sir.

THE COURT: You see, I don't know what you mean by highest in the state. You mean their costs are one of the highest?

MR. DAVIDOFF: The Medicaid rate. That part of the rate excluding the capital part.

THE COURT: Is one of the highest in the state. I see.

MR. DAVIDOFF: Yes, sir. And should be. I don't mean that to be critical at all. It should be because it cares for very sick people. Our position is that the evidence that we have of a medical nature and a program review nature is that the facility does not need, notwithstanding the ill patients, to conduct its business the way it does. And that is that group of cuts that we referred to and that you referred to. The number of nursing supervisors, the high ratio of RNs to LPNs and those things which were alluded to in the management assessment, notwithstanding the high degree of illness of many of the patients.

THE COURT: How can somebody demonstrate to me one way or the other who is right?

MR. DAVIDOFF: That is a very difficult question because I am sure we can't have medical affidavits that will not be as dire as the ones presented. I know that our professional review so far consisting of physician and nurse assessment concludes --

THE COURT: Who did you consult? Did you consult any doctors?

MR. DAVIDOFF: Just Health Department staff in New York City, which is directly involved in the survey process.

THE COURT: Did they make a written report?

MR. DAVIDOFF: They did.

THE COURT: Where is the written report?

MR. DAVIDOFF: The report report is blended into the report you were given, the management assessment for Beth Abraham.

THE COURT: I don't have that.

MR. BRADLEY: May we have this marked as an exhibit, your Honor.

MR. MISHKIN: Your Honor, I might say that we have no objection to these management assessment reviews being marked for identification, but without any foundation as to how they were prepared and by whom they were prepared, we would object at this point to their being received.

THE COURT: He will identify it as to what it is. Mr. Davidoff, what is the number for identification or the letter? Does anybody have an exhibit list?

MR. BRADLEY: This is the first one.

THE COURT: Is this the first defendant's exhibit?

MR. BRADLEY: This is the first time we have taken testimony in this case, your Honor.

THE COURT: We will call it an exhibit in the Bulla case, Bulla Exhibit A. Defendant's Exhibit A in the Bulla case.

MR. SOKOLSKY: May we be supplied with a copy? It is news to us.

THE COURT: Yes.

MR. BRADLEY: I will see that a copy is given to counsel. I don't have any copies now.

THE COURT: Tell me what it is, Mr. Davidoff, and you identify it and lay a foundation.

MR. DAVIDOFF: If I am referring to the wrong case, I certainly don't mean to confuse the issue. This is the actual departmental preparation which summarized the management assessment that was conducted on -- that was completed on January 19, 1976 as to Beth Abraham which was one of the thirteen organization class plaintiffs in the nursing home class action. That is the summary document which was our professional judgment based on financial, legal and most important professional survey review of the facility. It was our recommendation definitely taking into consideration the nature of the patients in the facility that something in the magnitude of $2.8 million worth of cuts could be made and those people who are involved in the survey process, those people who are involved in licensing of the facility and its continued license are the same ones who said 2.8 could be cut without affecting the basic care being rendered, without affecting the rating of the facility in every category of the state. It was that document which is summarized on the first page of it and which was done in accordance with the plans of action which was set forth by all the plaintiffs in that class action when we were informed that today's session might involve Beth Abraham.

THE COURT: Defendants offer it?

MR. BRADLEY: Yes.

THE COURT: Received.

xxx (Defendant's Exhibit A received in evidence.)

MR. SOKOLSKY: It might be similar to a document that we do have, but from my inspection they are unalike.

MR. MISHKIN: Insofar as that is being received in the Homes case, the record will reflect our objection.

THE COURT: Overruled. It is received for both cases.

Now, look, we have got --

THE WITNESS: Your Honor, I am very familiar with that. If I can make a statement.

THE COURT: Yes, make a statement.

THE WITNESS: I am not familiar with the first couple of pages. But seeing it, I know the document. That is the document which I and my team were presented with and given ten minutes to look at in Albany, which according to my calculations, comes up to $2,600,000 worth of cuts. I was in Albany, I stated to Mr. Davidoff who agreed that the methodology used in the preparation of the completed document was unacceptable to me. It was that the state would complete one side of the pages that you have there. They in turn would record what their impression of what I said at that meeting was and I would never get to see that document again. I told him when I found that --

MR. DAVIDOFF: Excuse me, sir. I have to say --

THE COURT: I am not really terribly interested. Have you now had a chance to review this?

THE WITNESS: This is my review of that document. It cannot be summarized in a couple of paragraphs.

THE COURT: Where is it?

THE WITNESS: I believe it is part of one of the exhibits here.

THE COURT: You have reviewed it and you have commented on it in affidavits submitted to the Court?

THE WITNESS: Yes.

THE COURT: Have you, Mr. Davidoff, have you reviewed the comments, the detailed comments?

MR. DAVIDOFF: My own -- I have never seen it.

THE COURT: What do you mean, you have never seen it? You have got pages and pages of material.

MR. SOKOLSKY: It is addressed to you, Mr. Davidoff.

THE COURT: January 21, 1977. A letter from Mr. Frohlich to Mr. Davidoff with a lot of attachments. I guess it is Exhibit B, B-1 in this case. It is Exhibit B to one of the waive affidavits.

MR. MISHKIN: I think it is the second supplemental waive affidavits.

THE COURT: Have you reviewed it?

MR. DAVIDOFF: I have not.

THE COURT: Has anybody?

MR. DAVIDOFF: The appropriate staff in the Health Department has had some review of it. We have not completed it. I was informed that it still concluded that he couldn't meet anything.

THE COURT: The point is, look, we are talking --

the only way to accomplish anything here is to have an intelligent process. Now, whether this goes on in the District Court or the Health Department or the United States Supreme Court, it seems to me somebody had got to figure out an intelligent process to ultimately get down to the financial -- to the issues you are talking about. It is very important whether or not Beth Abraham can cut out $2.8 million a year or not. It is very important to everybody, right?

MR. DAVIDOFF: It certainly is.

THE COURT: It may be that those cuts would be disastrous or it may be that those cuts would be a very good idea. Now, I would say to you that the only way to get at the merits of that is to have some sensible procedure where the Department of Health goes thoroughly into the arguments of Beth Abraham. They have taken the trouble to produce an inch thick of analyses and that is a lot different from allowing them a quick comment which is put on the one side of the page in this Exhibit A.

MR. DAVIDOFF: I can't let it go on the record that that's all that was afforded. I must point out that that time frame was what was agreed to and suggested by their attorneys in that other action. We did that whole package within that three-week compromise situation.

THE COURT: Let's not have any bickering. The time frame -- I am not saying this in any critical way. I am sure that you are trying to cope with a lot of problems that are extremely difficult for a limited staff to cope with. I am very certain of that. But somehow within everybody's staff limits and time limits and so forth, here is one where there is no compromise, so far, no meeting of the minds and I am not satisfied, as I stand here, that the Health Department has intelligently reviewed the Beth Abraham side of the thing.

MR. DAVIDOFF: Sir, I must say I think in retrospect or as you discuss it, I must agree with you. I don't think we have.

THE COURT: How quickly can you -- I mean this is upon us. This is a situation where you have got a man testifying that the cuts in the nurses aides and so forth, they have already carried out or are leading to a lot more ulcers. You have a doctor saying that patients will die if the care is decreased. And at the same time, I am convinced that the Department of Health has not conducted the scrutiny of the two sides of the question they should. Now, all of that has got to get remedied.

MR. DAVIDOFF: I think that is a fair statement.

THE COURT: Now, how do we get it remedied and how fast?

MR. DAVIDOFF: Sir, if the document studied from cover to cover indicates in their best professional judgment that all that can be accomplished as far as further staff reductions are what have been described today, then we are going to continue to be at loggerheads notwithstanding --

THE COURT: How can you say that until you have looked at it?

MR. DAVIDOFF: I can say that, sir, because there must be a modicum of validity to our survey process and we are not worth our salt at all and I strongly doubt that is the case. We could be partially wrong indeed.

THE COURT: I never assume loggerheads. It seems to me that if you go into their detailed materials within a fair-minded objective way and if you go back to them and say we believe you are wrong for this and that reason, I mean you are not people who are really -- you are people who basically have the same objective. You want to have good care, basically good care. You don't want patients unnecessarily getting skin ulcers and dying, right?

MR. DAVIDOFF: Certainly not.

THE COURT: So, it does seem to me that people who know the business as you and they do should be able, if you go into this in detail, to at least narrow the issues.

It may be that there are some further cuts that can be made, but it may be that there is an irreducible minimum that is reached before you get to what you thought of, right?

MR. DAVIDOFF: Yes, sir.

THE COURT: I have a feeling that that is the way that most of these cases will have to be handled ultimately. There has got to be some give.

MR. DAVIDOFF: That's been our experience so far.

THE COURT: It is almost inevitable.

When can you do this? Can you settle down tomorrow and have somebody who is very knowledgeable sit down for as many hours as necessary with the Beth Abraham people, go over their written materials and give them what is needed? This, I think, to me is a special case.

MR. DAVIDOFF: Pardon me?

THE COURT: This is something that has to be handled right now.

MR. DAVIDOFF: I agree. We can start tomorrow with an analysis with or without Beth Abraham at their choosing. The staff that is involved in this are all Albany based and I would strongly urge that review be conducted there.

THE COURT: Where is Beth Abraham?

THE WITNESS: In the Bronx.

MR. DAVIDOFF: In the Bronx. I can modify this. There is some review that could be further done by our New York City staff with them. I am loath to make any promises or recommendations to you that are really token discussion. I know you are not interested in this. We are trying to get to the bottom of this as we have with the other ones we have analyzed. Work can be done simultaneously. That lengthy report should and could be reviewed in an appropriate department by the Albany based people. We can have the nursing review people do work here simultaneously. We can work out any combination of those things that's agreeable to that situation.

THE COURT: Let me ask you this, Mr. Davidoff. I think we talked earlier about the fact that sometime in 1975 the Department of Health mandated an increase in registered nurses as 63.

MR. DAVIDOFF: Correct.

THE COURT: I think you said that the nursing home started to try to hire some additional people.

MR. DAVIDOFF: Correct.

THE COURT: Now, at any time before November 1, were they told that that mandate was withdrawn or cancelled or modified?

MR. DAVIDOFF: Not to my knowledge.

THE COURT: Were they at any time after November 1 told that that mandate was cancelled, modified or withdrawn?

MR. DAVIDOFF: It is my opinion in view of the exhibit that you have that the discussion on the 19th did in fact --

THE COURT: Of January?

MR. DAVIDOFF: Of January. Management assessment did in fact, blending in what cuts could be made, did in fact say that mandate could be withdrawn.

THE COURT: Look, Mr. Davidoff. Just picture again what I think I alluded to earlier. A nursing home is going along and not only are they told to cut their nursing staff but they are told there is a mandate to increase it. All of a sudden without any notice their rates are cut as of November 1, 1976 to the tune of $85,000 a month. A total of $170,000 for the two months. Going into January, their rates are lower than the November rate by $50,000 a month. Finally on January 19 they are told you better cut your nursing staff.

Now, I wish I could convince you and Mr. Mantsoris that that is not anything approaching a sensible procedure. I think it is fine to now have an in-depth review of their costs and it is possible that you can convince them of some cuts that can be made, maybe they can convince you of some things. But this is all to the good. This whole business has got to have what we say is in-depth review. But you can't turn the clock back and really there is, just on the face of what you told me, I don't see how you could have expected them to be ready for the $85,000 per month cut on November 1.

MR. DAVIDOFF: They couldn't have been.

THE COURT: Now, I would ask you: You have approached me in this case -- apprach isn't the right word. But you have spoken. You have spoken in the court proceedings of the general concept that the Department of Health's goal is to have these homes break even. They have to break even or else the system collapses, correct?

MR. DAVIDOFF: That is correct.

THE COURT: Now, whatever losses they were suffering before November 1 is not -- I can't do anything about it in this litigation. But the 85,000 a month for November and December is not exactly a drop in the bucket. That is a substantial amount of money. I would suggest quite firmly that under the circumstances of this case -- and I am not suggesting it applies to other cases, because I think almost every case here is on a different footing -- but I am suggesting for the reasons that we have stated that it might just be common, practical sense to provide them with the $85,000 per month I don't think they had any opportunity to protect themselves against. I don't think it provides a precedent for other cases. I think it stands on its own footing.

MR. DAVIDOFF: I am afraid it does.

THE COURT: If there are other cases like it, so be it. I just say to you that --

MR. DAVIDOFF: Sir, our position is, if I can state it accurately. I will try very hard. Our position is that whatever is left over after cuts are made, realistic cuts are made, must be reimbursed to the facility.

THE COURT: I follow that. They cannot make the cuts retroactively.

MR. DAVIDOFF: I agree. But when we analyze on a good faith professional analysis whatever cuts for the total period can be made, we must then, as we did in the cases we have handled so far, take into consideration that retroactive position in recommending a rate increase for the time frame and remember they would go back to November 1, the time of appeal, to the division with the other budget.

THE COURT: Wait a moment. I hear you talking. There is an element of time here.

MR. DAVIDOFF: Agreed.

THE COURT: I have a feeling that in this case you are not going to finish tomorrow or the next day if you do a good job. I don't see that there is any way in the world that you can have costs cut retroactively. I think the sensible thing to do is to provide them with the $85,000 per month for November and December and the $50,000 per month in January and -- or at least part of January -- maybe we say provide them with the 85 per month for November and December and the 50,000 a month, only give them half a month. In other words, if you say we confronted them on January 19 with the need to cut. Okay, I will hold that in abeyance. But I am saying to you, Mr. Davidoff, that I can't think of a very good reason they should be cut 85,000 a month beginning November 1. Unless their losses are phony or something.

MR. DAVIDOFF: The losses are not phony. But in every one of the other cases, the same situation prevails and we work very hard on those because they had imminent default. In a couple of cases they had some that involved the state mortgages and you got all the evidence out on that subject. I know the receivables are piled up.

THE COURT: And that is very important.

MR. DAVIDOFF: It is not good business to have receivables.

THE COURT: It is not good business.

MR. DAVIDOFF: But we have not, and I certainly would not be in a position to agree to grant that kind of restoration of money to one facility when all the others have exactly the same problem and were even in a more precarious cash position than this one. This facility has testified that they have an increasing backlog in receivables. They are not at the brink of bankruptcy as the others were. I am not for one moment advocating brinkmanship, far from it. But I would be very concerned about the precedent for all the others --

THE COURT: I am not concerned about the precedent, if it is a good thing. You give me some way to work it out which I can understand in a vague way. Let me see if I understand. In other words, if you undertook a review and you were satisfied that they cut all they could, let's suppose that leaves a deficit that could not be taken care of.

MR. DAVIDOFF: By cuts?

THE COURT: By cuts.

MR. DAVIDOFF: Then they are entitled to a full appeal dollar for dollar retroactive to November 1 on the balance sheet.

THE COURT: Let's examine the period November 1 to the present. They can't make cuts going back then.

MR. DAVIDOFF: That is correct.

THE COURT: Well, what --

MR. DAVIDOFF: The arithmetic by restoring to them on appeal retroactive to November 1 will give them the added cash flow to make them whole. Which is exactly what we did in the other cases. Certainly they are out of pocket.

THE COURT: Can't you reasonably -- I am just trying to get some headway here. Can't you reasonably foresee that they will be entitled to something additional back in November 1 under the logically developed --

MR. DAVIDOFF: In my judgment as I now understand and worked closely with a few of these, all the cuts we recommended will not be sustained. They will be probably entitled to something retroactive to November 1. I can't predict what it is.

THE COURT: Look, Mr. Davidoff, I would agree with you. Under the facts and circumstances here and I think you must take -- you have to take into account that you cannot turn the clock back and make cuts now in November. It is a fact of life if those obligations are incurred, that is part of the financial picket.

Now, why would it not be that you would give them rates, say, for November 1 and December sufficient to have them break even in November and December? They cannot cut for those months.

MR. DAVIDOFF: That's true. Maybe I can respond this way. First of all, I would point out that if the $66 rate were restored, they would break even and make a profit.

THE COURT: I was about to say that.

MR. DAVIDOFF: Secondly and more importantly, if we found after a thorough analysis, and I must say parenthetically because I participated only in a portion of this one meeting, there were many going on at the same time, that both sides seemed to display a pretty good degree of intrasigence, that was my own personal view of things.

THE COURT: What do you mean by both sides?

MR. DAVIDOFF: Both the home and the staff department. One was saying it was two million eight and the others said we just got it and we can't cut a penny. If indeed, after a thorough regional analysis we backed off the entire 2.8 or 2.6, then they would have to get every penny of that money restored. The action would take place, the actual action, but it would be retroactive to November and they would go back and rebill the City of New York and they would recapture all the money they were out of pocket. While you can't turn back the clock by restoring, you do indeed turn back the clock in that sense. That has been a concept we have used throughout.

THE COURT: How long will it take you to come to the conclusions that we are talking about?

MR. DAVIDOFF: We need no more than a week, presuming we work out and I'm sure we can because we have worked with this facility in the past many times, assuming we get enough time to get together either here or in Albany or both.

THE COURT: Probably both.

MR. DAVIDOFF: We can do both.

THE WITNESS: Probably both.

MR. DAVIDOFF: We are willing to try to do that.

THE WITNESS: I am still faced with another problem.

THE COURT: The thing is, I do not want to have a situation where there are any cuts in the staff pending this review. Do you understand that?

MR. DAVIDOFF: We have no objection to that. In other words, some pressure brought to bear by health to say you must do this, that or the other thing?

THE COURT: No, I am talking about economic pressure. I want to know this. Let me ask you, Mr. Frohlich, whatever cuts have been made as of now have been made and you have told me about the aides and the like.

THE WITNESS: Yes.

THE COURT: Now --

THE WITNESS: Can I comment on that for just one second?

THE COURT: Just a moment. The suggestion of the state to get your costs down to these rates would obviously entail the nursing staff cuts that we have been talking about.

THE WITNESS: Yes, sir.

THE COURT: Now --

THE WITNESS: And medical staff cuts.

MR. DAVIDOFF: And other areas as well.

THE COURT: And other areas. Now, what I am trying to say, Mr. Davidoff, is this. I do not think that it is proper to have some economic situation where they are forced to make further cuts while you are reviewing; do you understand me?

MR. DAVIDOFF: Yes, I believe so.

THE COURT: Now, if I am going to hear the results of this in a week, say, I am going to ask you, Mr. Frohlich, will there be during this week, and it will not be just a week, a week and a few days or something like that before it can all be sorted out, will there be any necessity for making any cuts, any further cuts in your staff?

THE WITNESS: Your Honor, further cuts in my staff -- first of all, I don't know what the end result of our meetings are going to be.

THE COURT: We don't. But I have found in other cases that the state has indeed as a result of the kind of review that Mr. Davidoff has come up with, it seems to me, that quite substantial adjustments have been made in rates; right, Mr. Davidoff?

MR. DAVIDOFF: Yes, sir.

THE COURT: So, despite the general cynicism which existed at the beginning of this litigation, it has simply not panned out. When enough work is done and everybody is reasonable there have been very substantial adjustments, retroactive to November 1, right?

MR. DAVIDOFF: Correct.

THE COURT: I will not foreclose it here.

THE WITNESS: Based on that part of it, let me tell you that last week I asked Miss Mackey to work up a program as best we could with forty less people in the nursing department because I told her it was imminent. I can say that with the cuts that have already been made in the dietary department, and I would not talk about rescinding it because I think we can do the work in the dietary department with less people and still provide the service and I think it is a worthwhile cost containment. We could go for another week and a half, meanwhile, my staff will have to continue working out their own revised staffing patterns if the cuts had to go through. So we could go for another week and a half.

THE COURT: Now, as far as the review, you are being given a week or so and I am going to assume that this review here is going to take into account all the materials that have been furnished.

MR. DAVIDOFF: Yes, sir.

THE COURT: Of course, that relates, that must relate, it seems to me, it goes without saying it has got to relate to the facts about the patient care. Now, I don't know what you mean by super care and adequate care, but all I say is that there has to be a close look at what these doctors say about the need for a lot of care to insure cleanliness and decency and some proper protection against disease and death and any more suffering than I am already sure they are going through. Now, that has just got to be part of it. I don't know how you do it, except, it seems to me, maybe you get a little more medical opinion than you have gotten. I just don't know. But I definitely -- we have already said this is a home where there are lots more ill people than usual and you obviously have to tailor your review to that.

Now, I am going to set a hearing for -- well, I would like to hear from you, Wednesday, March 9 at 4 p.m. You be back here.

MR. GASSEL: Your Honor, speaking for the patients, this Court is aware there has already been testimony that the effects have already been felt by these patients. Mr. Davidoff alluded to the fact that if the home is correct, the home could get its money retroactively. None of this would ever make up that loss to the patients. You can't make up reduction in care, reduction in services or skin ulcers by later financial adjustments. At the same time, if the home is not correct on its appeal, the state can have the same retroactive adjustment. I would ask again that some adjustment be made at this point because people are suffering. Possibly needlessly. Certainly there is a great risk that it is a needless suffering.

THE COURT: You mean to have the home rehire people it has discharged? What do you suggest?

MR. GASSEL: Yes, your Honor. Be permitted to make some adjustment in the meantime to increase its staff, if only with temporaries or something, to relieve the cuts which the evidence suggests may be unnecessary.

THE COURT: But what cuts are you speaking of?

MR. GASSEL: There was a cut in December of a substantial number of aides and orderlies. There has been testimony in an affidavit which has already affected the patients. That was the result of those November and December cuts. The cash flow stopped and they had to lay off people. If they get that money back six months from now or three months from now, that is not going to make up for that loss of care. It will put money back into the nursing home but nothing will ever make the patients whole.

THE COURT: You know, what you don't realize in all of this argument is --

MR. GASSEL: The state has its remedy too.

THE COURT: What you have got to realize is that ultimately the working out of the proper standard of care in the rates has got to be done by the State of New York through its agencies. It cannot be done by the Federal District Court. I will be perfectly frank with you, that until the Court of Appeals tells me to desist or the Supreme Court tells me to desist, I will view this litigation in the following way.

It seems to me that the most constructive thing to be achieved by this litigation is to exert some force to see that the Department of Health and its personnel are coming closer than perhaps they did before to grappling with the financial problems of the homes, maybe in a better way, maybe in a faster way than they did before. But -- and also to see that the homes, perhaps, are doing their share in getting together and having a meeting of the minds with the Department of Health. Because that is ultimately the only way this thing can run.

Now, if in the case of Loretto and Mary Manning Walsh and Beth Abraham we do, although it may take a little time, but if there is some reasonable meeting of the minds as to what the rates should be, it is vastly better than having this Court fire off an injunction which would do nothing but trigger an appeal and would not ultimately in my view solve very much. But I don't know enough about the facts and I am not the Department of Health and I am not going to be around worrying about -- I mean I worry about it, but I am not going to devote my career to supervising the financial status of the nursing homes. There are people who will devote their career and they are in the Department of Health. So, that is just my view of the long-range salvation.

MR. GASSEL: Your Honor, in all candor, I must say that the Court has done an admirable job of pushing the parties to get --

THE COURT: It is a candid remark.

MR. GASSEL: -- of pushing the parties along in this process, perhaps faster than they could be. As you are well aware of back and forth and coming to the equitable rate and going on for a long time and it is likely to go on for a long time. In the meantime, there are human beings involved here. What the patients are asking for in this court in the interim there be some relief to stop that surge, because ultimately whoever wins there will be a financial adjustment.

THE COURT: Listen. I am very sorry. But this is not tied to the kind of specifics that I can grapple with. Obviously -- let me say two things. I would say to Mr. Davidoff that among the other things you should consider is whether the cut in the aides which was already made was something that should have been done. Maybe that was done under pressure and maybe it should not have been made. If the people are getting ulcers which they should not, you have got to think about that and I am going to direct you to think very hard about that as well as these other things and not just assume that is something we can regard as a fait accompli, we don't have to worry about that. That was done obviously under financial pressure and maybe it should not have been done, okay.

MR. DAVIDOFF: Yes, sir.

THE COURT: No, as far as the timing -- look, I regret any suffering of anybody for a day. But I just think that I cannot -- I have no power realistically and legitimately to suddenly say, oh, I have got to do it today rather than next week. I must tell you that what I think will go on in connection with the Beth Abraham Home is the only thing I can expect. If it takes a week or ten days, it just has to do that. That is one of the necessities of life.

MR. GASSEL: I have only two things to say. One very specific thing. That what this Court can do in the interim is grant relief that will be washed out over time. If this Court were to grant interim relief to the home, service cuts could be restored and if they have to be made, they can be made. The money -- the state can recover its money. There will be no financial loss to the state by any interim relief granted.

THE COURT: I just do not see that as a way.

MR. GASSEL: My other offer to the Court is, we would be glad to make -- if you think the evidence is insufficient about the cuts and services that have already been experienced by patients, we would be glad to come in and offer additional evidence on those points.

THE COURT: I think the thing to do is offer your evidence efficiently to the Department of Health and see what they will do. They have not been intransigent so far.

MR. GASSEL: Your Honor, that clearly takes time to deal with them. In the meantime these things are going on.

THE COURT: They are going to devote intensive efforts over the week. Are you unwilling to participate in that?

MR. GASSEL: Certainly not.

THE COURT: We will participate in that.

MR. GASSEL: Does your Honor deny interim relief to this nursing home and to any member of the class in the patients' case?

THE COURT: Well, I think I am prepared to state that just as in the case of 76 Civ. 4113, that in my view the preliminary injunction on a class basis is denied for the same reasons I stated there. It seems to me that the situation as to each home has its particular facts and I am willing to deal with the situation on a home by home basis, as I stated in 76 Civ. 5113. But I believe it would be improvident and inappropriate to grant relief on a class basis. And so, to that extent, the motion for a preliminary injunction is denied and any injunction pending appeal is also denied.

MR. GASSEL: Thank you, your Honor. Should we submit a written order?

THE COURT: No, you do not need to.

Now, as far as the case of the patients of Beth Abraham, which is the only specific case presented to me, I am not granting or denying the preliminary injunction. I regard the hearing as unfinished. We are having another hearing next Wednesday and that matter seems to me is in abeyance as the record today shows.

(Adjourned to Wednesday, March 9, 1977.)

* * * * *

2217 Defendants' Exhibit A

BETH ABRAHAM HOSPITAL

FINDINGS OF FACT

$	74.30	13,520,445	1976 Reported Costs - based on 1975 cost of $69.44, trended
$	59.47	10,821,815	1976 Official Rate
$	14.83	2,698,630	Deficit

Department Recommended Cuts Description	Annual $ Value	Facility Response Annual $ Value
Administration	277,560	0
Nursing Administration	192,500	0
RN's	197,400	0
Aides and Attendants	378,000	0
Nutrition	237,807	100,000*
Social Work	120,349	0
Cleanliness and Safety	816,291	0
Rehabilitation Therapies	--	0
Leisure Time Activities	88,871	0
Physician Services	308,816	0
Medical Director	8,000	0
Total Cuts:	2,625,594	100,000
with 6.85% trend factor=	2,805,447	

* Per proposal set forth in letter to department; not specifically agreed to in conference.

ISSUES:

X-ray Technicians

Lab Technicians

Speech Therapy

1/19/77

BETH ABRAHAM HOSPITAL

GENERAL

Facility introductory remarks:

It was pointed out that the facility was advised Saturday by the Nursing Home Association to appear today. There was no mention of who should appear or what documents to bring. There was an expressed opinion of a disadvantaged position because of not being represented by attorney while the department had an attorney present.

A question as to the time frame for response was answered by Mr. Davidoff who said the reply should be as soon as possible and to the department, the nursing home association or the judge.

The facility's attitude is that "good-state" is not good enough and the facility seeks to provide superior service. A look at dollar expenditure is not enough and must take into account the effect on patient care. The proposed cuts will hinder present programs. The recurring theme was expressed that this institution is not a typical nursing home but a chronic disease hospital caring for a very ill population which defies comparison with other nursing homes.

The facility stated a response will be submitted to the proposal for budget cuts.

1/19/77

2219

Facility: Beth Abraham Hospital

ADMINISTRATION

1/19/77

$ ____________

DEPARTMENT CUT RECOMMENDATIONS

Justification

Statement by: Nasry Michelin, M.D.

Reductions are recommended commensurate with facility size and comparison with other nursing homes.

Documentation

FACILITY POSITION

Justification

Statement by: William Frohlich

Costs include overtime resulting from 1976 strike.

Abolition of the personnel department is impossible. This office deals with two unions and handles grievances.

Cannot accept the cut in admission services This function belongs under social services and should not be listed under administration.

The institution is a chronic disease facility with an intensity of service that makes comparison with a nursing home inappropriate. An institution of the nature of Beth Abraham cannot be handled by an administrative ~~Documentation~~ staff as recommended.

UNRESOLVED ISSUES

Patient care needs. DMS 1 form data relevant. Facility claims it is a chronic disease hospital, with service rendered at level different than nursing home.

COMMENTS

ADMINISTRATION

	Present	Proposed	Savings (incl. fring benefits)
Ececutive Director	$55,786	$40,000	$17,827
Administrator	36,508	30,000	7,079
Assistant Director	37,731	--	38,623
Fiscal Coordinator	21,061	--	24,793
Director of Engineering	36,000	24,000	13,200
Admitting	83,838	13,800	70,038*
Personnel	66,278	1 bookkeeper (assigned to Asst. Adm)	50,000
Bookkeepers	5 positions	2 positions	45,000
Mimeograph/Mailroom	33,826	--	11,000
			$277,560*

*Corrected figures, differs slightly from those given to facility.

Facility: Beth Abraham Hospital

NURSING ADMINISTRATION

2221

1/19/77

$ ____________

DEPARTMENT CUT RECOMMENDATIONS

Justification

Statement by: Edna Wienick

Cut nursing service administration
7.7 positions x $25,000 (est.) = $192,500

There are now 13.8 positions in nursing services administration which is excessive.

Documentation

FACILITY POSITION

Justification

Statement by: William Frohlich

Supervision of a large staff of registered and licensed practical nurses is needed.

Documentation

UNRESOLVED ISSUES

COMMENTS

Facility: Beth Abraham H[illegible]pital

2222 1/19/77

REGISTERED NURSES

$ ____________

DEPARTMENT CUT RECOMMENDATIONS	FACILITY POSITION
Justification	**Justification**
Statement by: Edna Wienick	Statement by: William Frohlich
onvert 65.8 RN positions to LPN 65.8 x $3,000 (est.) = $197,400 Conversion of RN to LPN positions resulting in a minimum acceptable level, with no loss of bodies, can accomplish the savings indicated.	LPN and RN are in different unions. A change in the rates would change the balance an would leave the facility in a more vulnerable position in the event of a strike by a union to which LPN's belong. The nature of the institution and the intensity of patient services require a high proportion of RN's.
Documentation	**Documentation**

NRESOLVED ISSUES

OMMENTS

AIDES AND ATTENDANTS 1/19/77

$ ____________

DEPARTMENT CUT RECOMMENDATIONS	FACILITY POSITION
Justification	**Justification**
Statement by: Edna Wienick	Statement by: William Frohlich
Cut 30 aides 30 x $12,600 = $378,000 There are now 240.5 aides and attendants. This may include some who are "lifters." An adequate number of daytime aides per nursing unit is considered to be 1:8 patients; for each unit (37 patients) allow 5 aides. For afternoons this can be reduced to 3; for nights 2. Using a factor of 1.5 as multiplier, the total number of aides is calculated to be 210 allowing for 24 hour, 7 day coverage.	"Lifters" do not exist. Orderlies give direct patient care. Patients are ill, hospital-related more than nursing home.
~~Documentation~~	Documentation

UNRESOLVED ISSUES

COMMENTS

FOOD - NUTRITION 2226 1/19/77

$ ____________

DEPARTMENT CUT RECOMMENDATIONS	FACILITY POSITION
Justification	Justification
Statement by: Renee Harker	Statement by: William Frohlich
1) A change to centralized food service roposed by the facility will, according to the proposal, effect a $100,000 saving. 2) The director of food service appears to be an unneeded position. 3) Employee meals should be a self-sustaining service.	Believes the cuts will hinder the program. The charge for staff meals is unacceptable.
Documentation 1) Letter from Elsie Goll to Dr. Toff, 12/30/76	Documentation

UNRESOLVED ISSUES

COMMENTS

BEST COPY AVAILABLE

NUTRITION

1)	Change to centralized food service at savings of $10,000 food costs, $90,000 salaries =		$100,000
2)	Cut Director of Food Service		28,200
3)	Charge for employee meals		
	70,500 meals x $2.00 =	141,000	
	Present income	31,482	
	Net		109,607
			$237,800

CLEANLINESS AND SAFETY 2228 1/19/77

$ ____________

DEPARTMENT CUT RECOMMENDATIONS

Justification

Statement by: John Kowalsky

Housekeeping

There are now 95 F.T.E. Comparison with other nursing homes indicates that 33 positions is adequate. This is based on one maid per 14 rooms plus a number of porters equivalent to 1/3 the number of maids, with allowance for weekend, holiday, etc. coverage.

Laundry

Comparison with other nursing home laundry operations indicates reductions are possible for laundry staff and in the cost of the laundry contract.

~~Documentation~~

Chauffers.

There seems no justification for two chauffers.

FACILITY POSITION

Justification

Statement by: William Frohlich

Housekeeping

This institution, in addition to 14 patient floors, has basements and floors containing occupational therapy, clinics, x-ray, etc. It also has seven elevators operated by attendants, with a total of 10 elevator operators. Also included is a seamstress.

A union contract with job descriptions makes impossible any shifting of personnel.

Department has incorrectly interpreted data submitted on HE-2.

~~Documentation~~

Laundry

Contract laundry is a bid item awarded to the lowest bidder. There is high usage of linen because of the very ill patient population

Chauffers

The cut of these positions is not appropriate.

UNRESOLVED ISSUES

COMMENTS

CLEANLINESS AND SAFETY

Housekeeping			
Have 95 F.T.E. @	$877,000		
Cut 62 positions			$570,291
Laundry			
Have 8.1 F.T.E.			
Cut 3.1	30,000	30,000	
Contract laundry	254,000		
Cut		78,000	
			108,000
Maintenance			
Have 29 6			
Cut 9 @	12,000 (est.)		118,000
Security			
No change			
2 Chauffers - cut			20,000
			$829,491

SOCIAL WORK

2228

1/19/77

$ ______________

DEPARTMENT CUT RECOMMENDATIONS

Justification

Statement by: Madeline Pinachio

Admissions appear to be handled apart from social services, therefore social services cut. Basis used that of typical nursing home social services department.

HE-2 list 17.4 positions relating to social services but scattered among activities, admissions, social services, recreation.

Documentation

FACILITY POSITION

Justification

Statement by: William Frohlich

Admission was incorrectly placed under administration and is part of social services. The facility deals with intensly ill population; problems not those of typical nursing home.

Positions are union scale salaries dictated by 1199 and State Nurses Association.

Documentation

UNRESOLVED ISSUES

COMMENTS

SOCIAL WORK

Have 17.4 positions		$195,949
Reduce to -		
Director (MSW)	$20,000	
Asst. Director (MSW)	15,000	
2 Social Workers @ $12,000	24,000	
½ Secretary	4,000	
	$63,000 - incl. fringe =	75,600
		$120,349

Facility: Beth Abraham Hospital

REHABILITATION THERAPIES 7230 1/19/77

$ ________

DEPARTMENT CUT RECOMMENDATIONS

Justification

Statement by: Ruth Dalton
Frank Snyder

No reductions recommended.

Documentation

FACILITY POSITION

Justification

Statement by: William Frohlich

Documentation

UNRESOLVED ISSUES

COMMENTS

LEISURE TIME ACTIVITIES 2231 1/19/77

$ ____________

DEPARTMENT CUT RECOMMENDATIONS

Justification

Statement by: Ruth Dalton

Cut Director	$22,000
Volunteers Office	33,093
Sheltered Workshop	31,778
	$88,871

Volunteers should be handled by administration.

Sheltered workshop should be self-sustaining.

There is a question about religious services at a cost of $18,000 salary.

Documentation

FACILITY POSITION

Justification

Statement by: William Frohlich

Department has misinterpreted HE-2 data.

Religious services are provided by a rabbi for approximately 15 hours per week who conducts religious services daily. He also works half-time in a kosher dietary function.

The volunteer office includes the salary of director and secretary and includes overtime pay resulting from strike.

With some 200 volunteers, a director is needed for recruitment, orientation and direction. Abolishment of this office is considered counter-productive.

Documentation

UNRESOLVED ISSUES

COMMENTS

Facility: Beth Abraham Hospital

NON ALLOWABLE COST ITEMS

2232 1/19/77

$ __________

DEPARTMENT CUT RECOMMENDATIONS

Justification

Statement by: Nasry Michelin, M.D.

1)	Physician services	$308,816
2)	Medical Director	8,000

Documentation

1) Cut based on allowable ceiling of $180 per bed annually.

2) Exceeds allowable ceiling of $40,000.

FACILITY POSITION

Justification

Statement by: William Frohlich

Documentation

UNRESOLVED ISSUES

COMMENTS

2233 **Facility:** Beth Abraham Hospital

1/19/77

MISCELLANEOUS

$ ___________

DEPARTMENT CUT RECOMMENDATIONS	FACILITY POSITION
Justification Statement by:	Justification Statement by: William Frohlich
Documentation	Documentation

NRESOLVED ISSUES

X-ray technicians

Lab technicians

Speech therapy

OMMENTS

2234

Beth Abraham Hospital 1/19/77

Edward Howard	NYS Dept of Health. Central Office
Terry Freedland	" "
Renée Harker, Nutritionist	NYS Dept Health NYC office
Tony Timmarchi	" " ESP
Madeline M. Penachio	N.Y.S Dept of Health
John S. Kowalsky	NYS " " "
	N.Y.S.
William Adelman	Beth Abraham 00009
Eliz Z. Hall	" " 0075
Louise Macchia	Beth Abraham 0169
Myra Garrison	Beth Abraham.
Estelle Wall	NYS Dept of Health
Bert Shaw	Beth Abraham
William Frohlich	BAH